92-554

No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES DOYLE FLEENOR, et al.,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit, in affirming the district court's grant of respondents' motions for summary judgment properly applied the statutory standard of Rule 56(c) of the Federal Rules of Civil Procedure, as implemented by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), and *Adickes Corporation v. Kress & Co.*, 398 U.S. 144 (1970), as requiring federal courts to consider *all* the evidence submitted in opposition to a motion for summary judgment and to view such evidence most favorably to the non-movants?

2. Whether the Court of Appeals, in affirming the district court's denial of petitioners' motions to certify the underlying lawsuit as a class action or alternatively to amend the complaint to include additional named plaintiffs as untimely filed, misapplied Local Rule 13 of the district court and Rules 23(c)(1) and 15(a) of the Federal Rules of Civil Procedure, and in doing so denied petitioners, and other current and former railroad employees, due process of law in violation of their Fifth Amendment rights and protections?

3. Whether the Court Of Appeals, in affirming the district court's holding that the controversies under review were "minor" disputes subject to arbitration, erred (1) in failing to find that the disputes were in fact "major" and thus within the district court's jurisdiction to resolve directly, and (2) in failing to find that even if "minor" disputes, the district court had jurisdiction under the exceptions recognized by this Court in *Crozek v. O'Mara*, 397 U.S. 25 (1970) and *Nemitz v. Norfolk & Western Railway Co.*, 436 F.2d

841 (6th Cir.), aff'd, 404 U.S. 37 (1971), as authorizing direct judicial relief, including ordering arbitration under court supervision?

LIST OF PARTIES

Petitioners:

James Doyle Fleenor; William R. Pace; Johnny E. Jones; Waddell Wash; Edward Pierce; and Thomas R. Mitchell.

Respondents:

Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railway Carmen of the United States & Canada; Brotherhood of Airline & Steamship Clerks, Freight Handlers, Express and Station Employees; Gulf & Mississippi Railroad Corporation; Illinois Central Railroad Company; and United Transportation Union.

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Petitioners,

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners James Doyle Fleenor, William R. Pace, Johnny E. Jones, Waddell Wash, Edward Pierce, and Thomas R. Mitchell[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered July 2, 1992, and as grounds therefor state as follows.

OPINIONS BELOW

The Court of Appeals affirmed, *per curiam,* the judgment and order of the United States District Court for the Southern District of Mississippi, Jackson Division; the judgment of the United States Court of

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[1] Thomas R. Mitchell is deceased; the executrix of his estate represented his interest in the proceedings below.

Appeals (No. 91-7128, *James Doyle Fleenor Et Al. v. Brotherhood of Locomotive Engineers, Et Al.*, dated July 2, 1992), is reprinted as Appendix A hereto.

The underlying Bench Opinion of the district court (Civil Action No. J85-0613(W), *James Doyle Fleenor, Et Al. v. Brotherhood of Locomotive Engineers, Et Al.*, dated May 22, 1990, is reprinted as Appendix B; the district court's related judgments and orders, dated September 21, 1990, and September 27, 1991, respectively, are reprinted as Appendix C.

The Interstate Commerce Commission's ("ICC") decision in Finance Docket No. 25103, *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile And Ohio Railroad Co., Illinois Central Railroad Co., Et Al.*, served January 10, 1975, is reproduced as Appendix D; the ICC's decision in Finance Docket No. 30439, *Gulf & Mississippi R.R. Corp.—Purchase Portion—Exemption—Illinois Central Gulf R.R. Co.*, served January 2, 1985, is reproduced as Appendix F; and the ICC's decision in *Illinois Central R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, served April 3, 1989, is reproduced as Appendix H.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 2, 1992; this petition for certiorari has therefore been filed as required within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES

The text of the statutes cited below is set forth as Appendix J.

28 U.S.C. §1254(1)	Courts Of Appeals, Certiorari, Appeal, Certified Questions.
28 U.S.C. §1291	Jurisdiction Of Courts Of Appeals.
45 U.S.C. §152 First, Second, Sixth and Seventh	Dispute Resolution, Railway Labor Act.
45 U.S.C. §153 First (i)	National Railroad Adjustment Board.
45 U.S.C. §156	Changing Rates Of Pay, Rules, and Working Conditions.
49 U.S.C. § 10505	Authority Of ICC To Exempt Rail Carrier Transportation.
Rule 15(a), Fed. R. Civ. P.	Amended And Supplemented Pleadings.
Rule 23(c)(1), Fed. R. Civ. P.	Class Action Notice And Determination.
Rule 56(c), Fed. R. Civ. P.	Summary Judgment, Motions And Proceedings Thereon.
Rule 6(d), S.D. Miss. Uniform Local Rule	Scheduling Order.
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Rule 13, S.D. Miss. Uniform	Class Action Determination.

Local Rule

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STATEMENT OF THE CASE

A. The Interstate Commerce Commission's Merger Decision.

As a condition of its approval of the consolidation of the Illinois Central Railroad Co., and Gulf, Mobile & Ohio Railroad Co., and thereby the creation of Illinois Central Gulf Railroad Company ("ICG"), the ICC adopted and approved labor protection agreements negotiated with ICG by five[2] of the railroads' operating unions (the "1973 Labor Agreements"). *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile & Ohio Railroad Co., Illinois Central Railroad Co.* (the "*Merger*" case), 338 I.C.C. 806 (1971); as modified by an order, served January 10, 1975, Appendix D.

All the Agreements contained a "decline in business" provision which permitted ICG to temporarily reduce its labor force if the railroad's operating revenues and ton-mile revenue freight dropped below

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[2] The unions were the respondents: Brotherhood of Locomotive Engineers ("BLE"), Brotherhood of Maintenance of Way Employees ("BMWE"), Brotherhood of Railway Carmen of the United States and Canada ("BRAC"), Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees ("BRC"), and United Transportation Union ("UTU").

1969-1970 levels. The Agreements also provided for arbitration of disputes.[3]

After the merger, ICG began an aggressive program to reduce its rail operations by selling and abandoning various segments of its rail lines. By the end of 1985, it had reduced its system from about 9,650 to 4,680 miles, with plans to further shorten its trackage to a core system of around 3,000 miles. One of ICG's largest rail line dispositions was the sale of 713 miles of trackage known as the "East Mississippi Lines" to the Gulf & Mississippi Railroad Corporation ("G&M") (R. 90).[4] As a condition precedent to the sale, the Purchase Agreement required that there be a reduction of protected employees and the curtailment of benefits under ICG's Labor Agreements. To this end, G&M was required to hire ICG employees from a list supplied by ICG; prospective employees had to resign from ICG and release the railroad from any claims under the 1973 Labor Agreements. (Purchase Agreement, pp. 13-16; R. 91-92.)

On March 16, 1984, G&M filed a petition with the ICC under 49 U.S.C. §10505, requesting that its acquisition of the East Mississippi Lines be exempted from the regulatory review requirements of 49 U.S.C. §10901 and that "no labor protection" be imposed.

The Railway Labor Executive Association ("RLEA"), the unions' umbrella organization, filed a

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[3] Section 4 of BLE's Labor Protection Agreement is typical of the others and is reproduced in part as Appendix E. Section 10 of the BLE Agreement is similar to the dispute resolution provisions of the other Agreements.

[4] "R." refers to the page of the record as filed with the court of appeals.

protest opposing G&M's request that the exemption be granted without labor protection (R. 42-43, 103). As part of RLEA's opposition, it submitted statements to the ICC by BRC and BRAC supporting labor protection. BLE, BMWE, and UTU failed to provide any meaningful support, even though many of their members also stood to be adversely affected by the transaction (R. 43-44, 103-105, 900-901). The ICC approved the exemption, and as requested by G&M did not impose labor protection, stating: "although the labor representatives made certain general allegations of potential harm to affected employees, they did not attempt to qualify this harm." (R. 44-45, 409, 413-414). (Finance Docket No. 30439, *Gulf & Mississippi Railroad Corporation—Purchase (Portion) Exemption—Illinois Central Gulf Railroad Company*, served January 2, 1985, Appendix F.)

On January 23, 1985, RLEA filed a petition in the United States Court of Appeals for the District of Columbia Circuit (*Railway Labor Executive Association v. Commission*, No. 85-1049, D.C. Cir., July 1, 1985) for review of the ICC's exemption decision (R. 45, 792). Concerned by the unions' failure to protect their employment rights before the ICC, seventy-six ICG employees, on February 1, 1985, formed the ICG Concerned Workers Association ("Association") and intervened in the court of appeals proceeding in support of RLEA (R. 45, 107-108).

However, while review was pending before the court of appeals, the unions negotiated "Transfer Agreements" with ICG; in effect consenting to the sale of the East Mississippi Lines and accepting the ICC's refusal to impose labor protection for members of their unions. The "Transfer Agreements" required

that the unions withdraw their opposition to the ICG/G&M transaction. Accordingly, on instructions from the unions, RLEA withdrew the petition for review. The Association sought to sustain the review, but on July 1, 1985, the court of appeals dismissed the action on the grounds that the Association, not having been a party to the proceeding before the ICC, lacked standing to challenge the ICC's decision. ICG's sale of the East Mississippi Lines was consummated on July 9, 1985 (R. 45-46).

The Transfer Agreements gave the employees a choice: (1) remain with ICG and be covered by the 1973 Labor Agreements, (2) accept the terms of the "Transfer Agreement," which offered substantially less protection than the 1973 Labor Agreements, or (3) resign and accept employment with G&M at about 85% of what they were being paid by ICG and with reduced health and other benefits. An employee who stayed with ICG risked being furloughed under ICG's interpretation of the "decline in business" formula as authorizing it to reduce its overall labor force by the percentage the sale reduced its operating revenues and ton-mile revenue freight below the 1969-1970 standard. ICG employees had 30 days to decide whether to remain under existing Labor Agreements or to accept the terms of the "Transfer Agreements" (R. 37-38, 96).

More than 200 employees were offered employment by G&M and left ICG; about 200 others elected to stay with ICG. Other protected employees, and those not covered by the 1973 Labor Agreements, accepted severance pay, if offered, because they would be furloughed under ICG's interpretation of the "decline in business" formula (R. 39).

B. The District Court's Decision And Related Proceedings.

Unable to obtain review of the ICC's exemption decision by the court of appeals, six members of the Association, in their own right and for other current and former ICG employees, filed a complaint on June 12, 1985, amended July 2, 1985, in the United States District Court for the Southern District of Mississippi, Jackson Division, charging (1) the unions with the failure to fairly represent the interests of their members and ICG with breaching the 1973 Labor Agreements in violation of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, as amended, and the Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, as amended, and (2) G&M with having tortiously interfered with the Labor Agreements. The complaint also alleged that a class action was maintainable under Rule 23(b)(1). Compensatory and punitive damages were sought as well as injunctive relief (R. 53-54).

All respondents, except BRC, filed answers to the complaint denying the charges (R. 78-119, 221-230, 248-300). For its part, BRC filed a motion on August 16, 1985, to dismiss or alternatively for summary judgment, claiming that the district court lacked subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, and that there was no material dispute of fact and BRC was entitled to judgment as a matter of law (R. 303-305). Petitioners replied to BRC's motion on September 6, 1985, arguing that it was without merit and should be denied (R. 300-311).

Discovery began in September, 1985. Documents were provided and examined by both sides, and respondents' depositions taken in late September, 1985. On October 15, 1986, a Scheduling Order was

issued by the district court: all discovery was to be completed by October 31, 1986, motions for joinder of parties served by October 23, 1986, and all motions, except *in limine* motions, filed on or before November 28, 1986 (R. 387).

On December 1, 1986, ICG filed, with leave of court, a motion to dismiss or alternatively for summary judgment for the same reasons previously advanced by BRC and for the additional ground that petitioners' depositions, taken in September, 1985, allegedly failed to establish that petitioners had been injured by the sale (R. 511-535). The other respondents filed similar motions, the last of which was submitted to the district court on March 23, 1987 (R. 886-890).

In reply petitioners submitted documents obtained through discovery from the files of ICG after their depositions had been taken, showing a program by the railroad to interfered with the employment rights of petitioners and other current and former employees of the railroad under the 1973 Labor Agreements and subsequent agreements. In addition, thirty-one affidavits of current and former ICG employees, including the affidavit of Thomas R. Mitchell, one of the petitioners, were filed with the court, indicating that, as charged in the complaint, ICG had in fact affirmatively interfered with the contract rights of petitioners and similarly situated ICG employees, and as further alleged, the unions had failed to fairly represent petitioners and other Association members as required under the Railway Labor Act. (Affidavits were subsequently filed by the other petitioners to the same effect in support of the class action certification motion, discussed *infra*.) It was pointed out to the court that petitioners' depositions had been

taken in late September, before discovery was completed, and at a time when petitioners were not privy to the evidence obtained from respondents' records. By October, 1987, all of respondents' motions had been replied to by petitioners and were ready for a decision by the district court (R. 598-700).

Shortly after the railroads filed their motions to dismiss, petitioners filed a motion with the district court to "Stay The Proceedings And For Referral To The Interstate Commerce Commission." The purpose of the petition was to get the ICC to clarify the meaning of the "decline in business" formula that it had approved and adopted as part of the 1973 Labor Agreements. Respondents opposed the motion. Eighteen months passed with no action by the court on the referral motion; so on June 24, 1988, a petition was filed directly by the Association with the ICC, asking it to determine whether the "decline in business" formula applied only to temporary business downturns caused by normal business cycles or included reductions artificially created by ICG's rail sales.

By a decision and order, served April 3, 1989, the ICC denied the petition, stating that what the "decline in business formula" meant was subject to mandatory arbitration under the Labor Protection Agreements and petitioner was "in the wrong forum" (Appendix H, pp. 59a-60a). In addition the ICC stated that an arbitration committee had previously concluded that the "decline in business" formula did not exclude declines resulting from line sales.[5] A petition

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[5] The ICC's reference was to *In Re Arbitration Between: Brotherhood Of Railway Carmen Of The United States And Can-*

to Reopen The Proceeding And For Reconsideration was filed with the ICC; it was denied on September 11, 1989. A third petition was filed seeking reconsideration; it too was denied by the ICC (Appendix I).

While the petitions were pending before the ICC, petitioners, on July 21, 1989, filed motions with the district court seeking certification of the lawsuit as a class action and alternatively for leave to amend the complaint to include 185 current and former ICG employees as named party plaintiffs (R. 1068-1161). Petitioners had not theretofore filed a class action motion because of the failure of BRC to file an answer to the complaint; petitioner understood that under the district court's Local Rules, the failure of BRC to file an answer to the complaint tolled the class certification requirement. Respondents filed motions to strike, contending that under the court's rules petitioners' motion for class action certification was filed too late and violated the Scheduling Order; the motion to amend the complaint was also argued to have been untimely filed (R. 1162-1201).

On May 22, 1990, the district court rendered a Bench Opinion, granting respondents' motions and dismissing the complaint. The court held (1) that the depositions of the six petitioners failed to establish that the unions breached their duty of fair representation under the test of *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), (2) that whether ICG breached

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ada And Illinois Central Gulf Railroad Company, decided June 27, 1986, in which the arbitration committee upheld the ICG's mathematical application of the "decline in business" formula, "but declined to determine whether that interpretation was consistent with the ICC's intent in approving the 1973 Labor Protection Agreements." See Appendix G, pp. 52a-54a.)

and repudiated the 1973 Labor Agreements in violation of the ICC order was a "minor" dispute and a matter for arbitration, citing *Consolidated Rail v. Railway Executives*, 491 U.S. 299 (1989), and *Frandsen v. Brotherhood of Railway Airline & S.S. Clerks*, 782 F.2d 674 (7th Cir. 1986), and (3) that there was no evidence that ICG colluded with the unions and G&M to interfere with the employment contracts of petitioners. The court also denied petitioners' motions to certify the lawsuit as a class action and to amend the complaint to include additional named ICG employees as plaintiffs on the grounds that too much time had elapsed since the filing of the complaint, and the time for filing such motions under the Scheduling Order had expired. However, at the request of petitioners, the district court agreed to enter an order requiring the parties to go to arbitration (Appendix B, pp. 13a-14a).

On July 16, 1990, petitioners, on their own behalf and that of the 185 other named current or former employees of ICG, gave written notice to the respondents that, in accordance with the district court's Bench Opinion and the respective collective bargaining agreements, arbitration was requested to resolve the disputes resulting from the East Mississippi and related line sales (R. 1226-1249). Respondents refused to institute arbitration.[6]

On September 24, 1990, the court issued its formal judgment and order dismissing petitioners' complaint,

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[6] ICG, BRAC, and UTU responded that they would not institute arbitration (R. 1211-1219); BLE replied that the arbitration request was without merit and therefore would not be processed (R. 1220); the remaining respondents simply ignored the request.

but it failed to specifically order the parties to arbitration (R. 1204-1205). On October 2, 1990, petitioners filed a motion, asking the court to modify its judgment and order to compel arbitration in conformity with its Bench Opinion; the court was also advised of the refusal of the respondents to institute arbitration (R. 1206-1243). Nearly a year later, on September 27, 1991, the court issued a modified order; but again it failed to compel arbitration (R. 1254-1255). A Notice of Appeal was filed on October 17, 1991 (R. 1256-1257).

C. The Court of Appeal's Decision.

On Appeal, petitioners argued that the district court erred (1) in granting summary judgment in disregard of the criteria of Rule 56(c) and *Celotex Corporation v. Catrett, supra.*, (2) in holding that the controversies involved "minor" disputes under the Railway Labor Act when in fact they are "major" disputes and within the district court's authority to resolve in the first instance, and (3) in failing to recognize that even if they were "minor" disputes, the district court had jurisdiction to hear the complaints on their merits under the exceptions to the arbitration first rule set forth in *Crozek v. O'Mara*, 397 U.S. 25 (1970); and *Glover v. St. Louis S.F. Ry.*, 393 U.S. 321 (1969), and (4) in denying petitioners' motion to certify the lawsuit as a class action or alternatively to amend the complaint to include additional named plaintiffs contrary to the district court's own Local Rules and long standing judicial application of Rules 23(c) and 15(a). Respondents replied that the district court's decision was in conformity with the evidence and applicable law and should be affirmed.

The court of appeals set the matter down for oral argument, which was held June 30, 1992. On July 2, 1992, the court of appeals entered a judgment and order affirming, *per curiam*, the decision of the district court (Appendix A).

BASIS OF FEDERAL JURISDICTION

The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. §1291. This Court has jurisdiction to consider this request for certiorari under 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

A. The Decisions Below Conflict With Those Of This Court And Other Courts of Appeals As To The Correct Application Of The Standards For Summary Judgment Under Rule 56(c) Of The Federal Rules Of Civil Procedure.

Rule 56(c) provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." The burden of persuasion is imposed on the moving party, and it is a stringent one, with any doubt as to the existence of a genuine issue for trial to be resolved against the moving party. *Celotex Corporation v. Catrett, supra.*; *Adickes v. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In determining whether a moving party has met its burden of persuasion, federal courts are obliged to take into account the entire setting of the case, and they must consider "all papers of record as well as any material prepared for the motion." (Emphasis supplied.) *See e.g., Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (1st Cir. 1983); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d

653, 656 (5th Cir. 1979); 10A Wright, Miller & Kane s 2721, p.44. As explained by the Court of Appeals in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Cir. 1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [non-moving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F.2d at 258. And where, as here, motivation is a major issue before the district court, this Court has held summary judgment particularly inappropriate since witness credibility is critical. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711 (1945); *see also, Conrad v. Delta Airlines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1945).

The district court's grant of summary judgment in this case does not satisfy the statutory standard of Rule 56(c) or this Court's guiding decisions. The district court granted summary judgment primarily, if not exclusively, on the basis of preliminary depositions of petitioners taken shortly after the amended complaint had been filed and before discovery had been completed. The court did not specifically discuss, and it is not clear that it even considered, the documentary evidence subsequently obtained through discovery by petitioners from ICG's own files of a program, and its implementation by ICG personnel, to interfere with the contract rights of ICG employees under the 1973 Labor Agreements. Nor did the district court specifically discuss the thirty-one affidavits, including an affidavit of petitioner Thomas R. Mitchell, demonstrating the severe impact of ICG's program upon

ICG employees. In addition, the district court failed to discuss the affidavits submitted by the other petitioners in support of the motion for leave to certify the lawsuit as a class action and indicating the personal injury to them resulting from the East Mississippi Lines sale (R. 1013-1161).

The court's Bench Opinion is also silent regarding the failure of the unions to submit meaningful evidence to the ICC in the exemption proceeding (Finance Docket No. 30439, *Gulf & Mississippi R.R. Corp.—Purchase Portion—Exemption—Illinois Central Gulf R.R. Co.*, *supra.*, Appendix F) as to the adverse impact of the East Mississippi Lines sale on the unions' members, a failure that prompted the ICC to comment as to the generality of their effort. (Appendix F, p. 40a) There is no indication either that the court considered the unrefuted fact that, while supposedly negotiating with ICG and G&M to protect the interests of petitioners and other Association members under the 1973 Labor Agreements, the unions were at the same time negotiating with G&M to be the exclusive bargaining agents of some of the same ICG employees to be transferred to G&M at wages and fringe benefits of less value than those they were trying to retain under their existing Labor Agreements, a clear conflict of interest.[7] Certainly this evi-

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[7] The amended complaint charged the unions with, among other things, (1) failing to furnish appropriate information to RLEA so as to protect the employees' interests in the exemption proceeding before the ICC, (2) placing the unions' organizational self-interest above the interests of the employees whom they were obligated to represent, (3) failing to disclose a conflict of interest between the unions efforts to continue to represent employees who were to be hired by G&M, while at the same

dence alone supports, at a minimum, the inference that petitioners' charge that the unions failed to fairly represent their interests had a basis in fact sufficient to require the denial of summary judgment.

It is clear from the foregoing that the district court improperly focused its attention on dated depositions of petitioners and failed properly to consider *all* the evidence subsequently submitted by petitioners in opposition to the motions for summary judgment, and that the court failed to resolve inferences to be drawn from such evidence in the light most favorable to nonmoving petitioners. *Celotex v. Catrett*, *supra*.; *Adickes v. Kress & Co.*, *supra*. Had the district court evaluated the record in conformity with the requirements of Rule 56(c) and this Court's decisions, it would have been compelled to deny respondents' motions to dismiss. Unless the district court's decision, as affirmed by the court of appeals, is corrected, it is an invitation to other district courts, especially in the Fifth Circuit, to grant summary judgments based on selectively chosen evidence and to ignore, without explanation, contrary evidence in the record as a whole.

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time conducting negotiations on behalf of the employees who would remain with ICG, (4) failing to fully, fairly, and honestly disclose to ICG employees the impact upon them of the various agreements then being negotiated, and (5) negotiating and entering into "Transfer Agreements" which were designed and intended to diminish and destroy employees' vested rights under the 1973 Labor Agreements and coercing and intimidating ICG employees into accepting such agreements (R. 48-50).

B. The Courts Below Erred In Denying, As Untimely Filed, Petitioners' Motions For Class Action Certification And Alternatively To Amend The Complaint To Include Additionally Named Plaintiffs, And Deprived Petitioners Of Due Process Of Law.

Rule 23(c)(1) provides that a class status determination should be made as soon as practicable after the commencement of a lawsuit brought as a class action. Local Rule 13 of the district court in principle tracks Rule 23(c)(1) by calling for a class certification 60 days after the filing of a lawsuit.

However, at the time the lawsuit was filed here, Local Rule 18 applied, and it provided that "[i]f there are multiple defendants in the case, the Motion for Class Certification must be filed and noticed for hearing within 45 days of the filing of the *last answer*." (Appendix J, p. 71a; Emphasis added.) The Local Rules were changed January 1, 1986, and Rule 13 substituted for Rule 18. New Rule 13 did not contain the *last answer* language; but the Preamble to the Revised Rules contained a savings clause, stating that the new rules applied to pending cases, unless *injustice* would result (Appendix J, p. 70a).

As seen, BRC elected not to file an *answer* to the complaint; instead it filed a motion to dismiss and alternatively for summary judgment. In accordance with Local Rule 18, applicable at the time, until BRC filed its answer to the complaint, time did not begin to run for the filing of a class action determination. In the circumstances, it was plainly an "injustice" for the district court to dismiss petitioners' class certification on the basis of a change in the Local Rules that occurred after the lawsuit was filed.[8]

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[8] When petitioners later filed their motion for class certifica-

As to the Scheduling Order, Local Rule 8(1) states that any motion beyond the motion deadline imposed in a Scheduling Order pursuant to Rule 6(d), *may* be denied because the motion was untimely. As noted above, the parties filed numerous motions and documents with the district court after November 28, 1986, with and without leave of court, and no one raised the Scheduling Order as a bar.[9] Although petitioners' motions to certify the class, or alternatively to amend the complaint to include the additional named party plaintiffs, did not specifically refer to the Scheduling Order, the relief sought, by necessary implication, clearly called for a waiver of the Scheduling Order and the motion was accepted by the district court without comment. It is submitted that the Scheduling Order was effectively superseded.

As to amending the complaint, Rule 15(a) provides that once a responsive pleading has been filed a complaint may be amended only by leave of court, which shall be freely given when justice requires. As this Court observed in *Foman v. Davis*, 371 U.S. 178, 182 (1962), leave to amend complaints is to be liberally given: controversies are to be decided on the merits, not technical aspects of pleadings; leave to amend

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tion, they asked the district court to waive Rule 13 if it was an impediment to the filing of the class action motion. (Memorandum of Points and Authorities In Support of Motion To Certify Class, pp. 1013-1162). The district court never addressed that request.

[9] *See, e.g.*, Motion of ICG to Dismiss Or In The Alternative For Summary Judgment, dated December 1, 1986 (R. 511-514); and similar motions of BLE, dated January 6, 1987 (R. 716-859); UTU, dated February 5, 1987 (R. 886-911); petitioners' motion, dated December 30, 1986 for Stay Of Proceeding And Referral To The Interstate Commerce Commission (R. 538-543).

"shall be freely given when justice so requires," the rules of procedure are to be construed "to secure the just, speedy, and inexpensive determination of every action." Following this directive, federal courts have consistently allowed complaints to be amended where (1) the moving party has not been guilty of bad faith and is not acting for purposes of delay, (2) the opposing party will not be unduly prejudiced, and (3) trial of the issues will not be unduly delayed. *See e.g.*, *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1985); *Jamieson By And Through Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981).

Petitioners manifestly acted in good faith in seeking to amend the complaint to include the named additional plaintiffs; in fact, they had no choice but to file the motion since it was feared that the district court's continued delay in rendering a decision on respondents' motions to dismiss would cause the statute of limitations to run on the claims of hundreds of other ICG employees. Had the motion to amend the complaint been granted, respondents would not have been unduly prejudiced since they knew of the Association's existence and the claims of its members. Moreover, a trial had not been scheduled, and further discovery would have plainly been required.

In the latter connection, it is also noted that while the Scheduling Order provided that all dispositive motions were to be filed on or before November 28, 1986, the district court permitted respondents to file motions to dismiss and for summary judgment beyond that date, and as a result, it was in October, 1987, before all the motions were filed. It was not until May 22, 1990, that the court finally rendered its

Bench Opinion; *three and a half years* from the date of its Scheduling Order limiting the time for filing dispositive motions and more than *30* months after the motions were ready for decision. Accordingly, it was the district court, not petitioners, that was responsible for the delay, which the court then used as the basis for denying petitioners' motions.

In light of the foregoing, this Court should grant certiorari with a view to requiring the courts below to correct their denial of petitioners' motions for class action certification or alternatively to permit the complaint to be amended to include the additional named plaintiffs, and for the reasons stated elsewhere in this petition, to require that the controversies be heard and resolved on their merits by the district court or by arbitration under court supervision.

C. The District Court, And The Court Of Appeals In Affirming Its Decision, Erred In Holding That The Disputes Under Review Are "Minor" And Therefore Subject Exclusively To Arbitration.

The district court's opinion raises an important issue under the Railway Labor Act that has consequences for thousands of workers currently covered by hundreds of collective bargaining agreements; namely, does a district court have an obligation to compel arbitration when a "minor" dispute is involved and the complaining employees have no leverage under the collective bargaining agreement to require the unions representing them to institute arbitration?

To begin with, it is well settled that a district court has jurisdiction over a lawsuit by employees against their unions for breach of the duty of fair representation. *Raus v. Brotherhood Of Ry. Carmen Of U.S. And Canada*, 663 F.2d 791, 795-798 (8th Cir. 1981);

28 U.S.C. §1337. And where good faith allegations, and facts supporting such allegations indicate collusion or otherwise tie the unions and the railroads together in arbitrary, discriminatory, or bad-faith conduct amounting to a breach of the duty of fair representation, the district court's jurisdiction extends over the union under a fair representation claim and over the railroad under a related contract violation claim. *Raus v. Brotherhood Of Ry. Carmen Of U.S. And Canada*, 663 F.2d 791 (8th Cir. 1981); *Hunt v. Missouri Pacific R.R.*, 729 F.2d 578 (8th Cir. 1984); *see also*, *Vaca v. Sipes*, 386 U.S. 171 (1967).

Employer-union controversies under the Railway Labor Act are divided into "major" and "minor" disputes. If an employer asserts a contractual right to take a contested action, the ensuing controversy is a "minor" dispute if the action is "arguably justified" by the terms of the collective bargaining agreement, and a "major" dispute if the parties seek to change the terms of an existing collective bargaining agreement. Federal district courts have subject matter jurisdiction over "major" disputes; "minor" disputes, however, are subject to compulsory and binding arbitration before an adjustment board established by the employer and the unions representing the employee, with judicial review of such decisions limited. *Consolidated Rail v. Labor Executives, supra.*; *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978); *Detroit & T. S. L. R. Co. v. Transportation Union*, 396 U.S. 142 (1969).

The district court, and the court of appeals in affirming its holding, erred first of all in concluding that the involved controversies were "minor" and not "major" disputes. Under the Railway Labor Act, no

carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or through the mediation process prescribed by the Railway Labor Act." 45 U.S.C. §§152, Seventh, 153 and 156. This is exactly what ICG was able to do with the help of the unions and G&M. Thus ICG, with the cooperation of union respondents, substantively modified the 1973 Labor Agreements to permit ICG to reduce its labor force and to avoid paying just compensation to discarded and displaced employees. Contrary to the holding of the court below, the labor disputes were therefore "major" and subject to the district court's jurisdiction. *Consolidated Rail v. Labor Executives, supra.*; *Union Pacific R. Co. v. Sheehan, supra.* The district court thus did have subject matter jurisdiction to hear the merits of petitioners' claims and those of other current and former ICG employees and to grant the relief requested.

But even if the district court correctly found the disputes to be "minor," it had jurisdiction under any one of three recognized exceptions to the general rule that a "minor" dispute be submitted first to arbitration before judicial relief can be granted. As recognized by this Court, those exceptions are (1) when the employer repudiates the private grievance machinery, (2) when resort to administrative remedies would be futile, and (3) when the employer is joined in a breach of fair representation claim against the union. *Crozek v. O'Mara, supra.*; *Glover v. St. Louis-S.F. Ry., supra.*; and *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3rd Cir. 1984).

All three exceptions were satisfied in this case. ICG and the unions repudiated arbitration by refusing to institute it when, in response to the district court's Bench Opinion, they were requested to do so by petitioners and other ICG employees. It would have been futile for petitioners, or other adversely affected ICG workers, to seek arbitration without the cooperation of the unions, since the unions are the sole representatives of their members for the purpose of instituting arbitration under the 1973 Labor Agreements, and unless the unions cooperated, the ICG workers were powerless to have their grievances individually considered. (*See, e.g.*, BLE Agreement, Appendix E, pp. 31a-32a; *Arbitration Decision*, Appendix G, pp. 44a-45a). Finally, the railroads were joined with the unions in the misrepresentation suit in the district court. *See, also Nemitz v. Norfolk & Western Railway Co.*, 436 F.2d 841 (6th Cir. 1970), aff'd, 404 U.S. 37 (1971); and *Vaca v. Sipes, supra.*

Accordingly, whether the disputes are "major" or "minor," in the context of this proceeding, the district court had the authority, and it is submitted the statutory obligation under the Railway Labor Act, to resolve petitioners' claims, and those of the other current and former ICG employees, by means of a trial on the merits or alternatively to order the parties to arbitration subject to the court's continuing supervision. By not doing either, the district court, with the approval of the court of appeals, denied petitioners of their right to be heard and deprived them of their property—employment rights—without due process of law, contrary to the protections of the Fifth Amendment. Stated another way, unless this Court grants petitioners' request for certiorari and requires the dis-

trict court to consider petitioners' complaints, and those of the other 185 ICG employees, either by a trial on the merits or supervised arbitration, there is no relief for them in the courts, at the ICC, or anywhere else.

Yet as important as this case is individually to petitioners and other ICG employees, it transcends their interests; this petition for certiorari involves a far more important legal issue: the proper role of the federal courts as the primary guardians of the duty of fair representation and the protection of worker's rights under the Railway Labor Act. *See, Crozet v. O'Hara, supra*; *Conley v. Gibson*, 355 U.S. 41 (1957). In this case the district court and the court of appeals have not met such responsibilities; this Court can right this wrong and reinforce such obligation by granting certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit affirming, *per curiam*, the judgment and orders of the district court.

Respectfully submitted,

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September 30, 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7128

JAMES DOYLE FLEENOR, WILLIAM R. PACE, JOHNNY E. JONES, WADELL WASH, EDWARD PIERCE and THOMAS R. MITCHELL,

Plaintiffs-Appellants,

versus

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Defendants-Appellees.

U.S. COURT OF APPEALS

FILED

JUL 02 1992

GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Southern District of Mississippi
(CA J85-0613(W))

Before GOLDBERG, JONES, and DeMOSS, Circuit Judges.

PER CURIAM:*

The judgment of the district court is AFFIRMED on the basis of its rulings.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J85-0613 (W)

JAMES DOYLE FLEENOR, ET AL
PLAINTIFFS,

V.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL
DEFENDANTS.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 26 1990
J. T. NOBLIN, CLERK
BY /s/ _____ DEPUTY

BENCH OPINION

BEFORE: THE HONORABLE HENRY T. WINGATE,
UNITED STATES DISTRICT JUDGE

DATE: MAY 22, 1990

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: MR. LESTER F. SMITH
MR. HARRY J. JORDAN

FOR THE DEFENDANTS: MR. JOHN L. MAXEY
MR. WILLIAM A. PYLE
MR. JOSEPH P. WISE

COURT REPORTER: MS. COLLEEN O'CONNOR WHITE, RPR
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COMPUTER-AIDED TRANSCRIPTION

THE COURT: The Court is now prepared to go forward. This is the case of *Fleenor v. Brotherhood of Locomotive Engineers, et al.*, Civil Action Number J85-0613(W).

Bench Opinion

This action involves a railroad labor/management dispute brought under the Railway Labor Act (RLA) 45 U.S.C. Sections 151, et seq.; and the Interstate Commerce Act (ICA) 49 U.S.C. Sections 11343, 11345, 11347 and 11705. Jurisdiction is alleged under 28 U.S.C. Sections 1331 and 1337 and 49 U.S.C. Section 1336.

The six individual Plaintiffs are present or past employees of the Illinois Central Gulf Railroad (ICG). The named Defendants are the ICG, the Gulf and Mississippi Railroad Corporation), and five separate union organizations (unions) who allegedly represented various Plaintiffs while employed by the corporate Defendant. The Defendants, by way of motions to dismiss, or in the alternative for summary judgment, have moved the Court to dismiss the complaint against them claiming that the Court lacks subject matter jurisdiction, and that the complaint fails to, state a claim upon which relief may be granted. Plaintiffs have answered the motions and, in addition, have moved the Court to allow them to amend the complaint to add additional Plaintiffs or to certify a class.

Background

The Defendant ICG was created by the merger of the Illinois Central Railroad and the Gulf, Mobile, and Ohio

Railroad Company in 1972. A merger order entered by the Interstate Commerce Commission (ICC) imposed certain conditions upon the ICG which resulted in the railroad and the unions affected to agree to certain protective agreements for the benefit of the employees of the merging companies. The employee benefits included obligations for job guarantees and severence benefits.

In 1984, ICG executed a Purchase and Sale Agreement with GMO Acquisition Corporation for the sale of approximately 700 miles of trackage. GMO was renamed G & M in 1984. The railroad in 1984 executed a Purchase and Sale Agreement with GMO Acquisition Corporation for the sale of approximately 700 miles of trackage. GMO was renamed G & M, and in 1984 it filed a petition with the ICC seeking an exemption of the imposition of labor protection condition on the purchase of the line. The ICC approved the petition. During the above transaction, the unions began negotiations with the railroad concerning those represented members who would be affected by the sale to G & M.

In early 1985, the unions and the railroad entered into what is known as the Transfer Agreements. Each agreement contained a dispute resolution procedure that culminates in binding arbitration.

Supposedly, although offered a position with G & M, Plaintiff Fleenor opted to stay with the railroad. He was later furloughed for lack of work. Plaintiff Pace elected to, stay with the railroad. Plaintiff Jones, according to the Defendant, was not covered by the Merger Protection Agreements. Plaintiff Wash also allegedly was not covered under the Merger Protection Agreements. Plaintiff Pierce remained with the railroad and was later furloughed from his position. He then voluntarily accepted the severence benefits he was entitled to and resigned his employment with the railroad. Mitchell remained with the railroad.

Plaintiffs claim that ICG reduced its work force in anticipation of the sale and that the unions did not use their best efforts to negotiate a favorable labor contract with G & M, and that such conduct was violative of their rights under the 1973 Labor Agreements.

Specifically, Plaintiffs allege three causes of action:

First Cause of Action

As to the named union Defendants in Paragraph 55, the Plaintiffs allege these Defendants have breached their duty to fairly represent the employees affected by the sale of the East Mississippi Line by ICG to G & M Railroad in violation of the Railway Labor Act, 28 U.S.C. Section 151. Paragraph 56 alleges that ICG and G & M conspired with the unions to undermine and destroy the contractual rights of the ICG employees pursuant to the 1973 Labor Agreement. Paragraph 57 alleges that ICG and G & M are necessary parties to afford Plaintiffs complete relief.

Second Cause of Action

Plaintiffs charge the Defendant ICG, with having breached and repudiated the 1973 Labor Agreements in violation of the ICC orders.

Third Cause of Action

Plaintiffs alleged that G & M, with the assistance of ICG, in its breach and repudiation of the 1973 Agreements tortiously interfered with the contractual relationship existing between the ICG and its employees.

Discussion on First Cause of Action

The Defendant unions have filed motions for summary judgment alleging: One, that this Court lacks jurisdiction since a review of the circumstances here would amount to a review of the Merger Protection Agreement and the ICC

Order which approved it; and secondly, that the depositions and affidavits of the Plaintiffs show that there are no genuine issues of material facts to withhold summary judgment from the Defendants.

Under the unions' first argument, especially as argued by the Brotherhood of Locomotive Engineers, the union seems to argue that Plaintiffs' dispute with them and their actions under the ICC approved orders should be characterized as a "minor" dispute which would require arbitration and thus that this Court would lack jurisdiction over the Plaintiffs' first cause of action. Ample case law, however, would refute the Defendants' interpretation of the law. In *Raus v. Brotherhood of Railway Carmen*, 663 F.2d 791 (8th Cir. 1981) at Page 798 the court stated:

"[W]here there are good faith allegations and facts supporting those allegations indicating collusion or otherwise tying the railroad and the union together in allegedly arbitrary, discriminatory or bad faith conduct amounting to a breach of the duty of fair representation, the district court has jurisdiction over the union on the fair representation claim and over the railroad on the contract violation claim".

This same language is repeated in *Hunt v. Missouri Pacific Railroad*, 729 F.2d 578, 580 (8th Cir. 1984). So, whether Plaintiffs' claim under Count I would survive Defendants' motion for summary judgment depend upon whether there are good faith allegations and facts supporting those allegation indicating collusion or otherwise tying the railroad and the union together in allegedly arbitrary discriminatory or bad faith conduct amounting to a breach of the duty of fair representation.

This then brings us to the unions Second contention that the depositions and affidavits of the Plaintiffs show that there are no genuine issues of material facts to withhold summary judgment from the Defendants. Here the Court considers the unions second challenge to, the claims of the

Plaintiff on the test of *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct.2548, 91 L.Ed.2d 265 (1986). This Court has reviewed the depositions and submissions of the Plaintiffs, the arguments of the unions, and the Court finds that the unions' motion should be granted.

The Court finds specifically as follows. Plaintiff Mitchell was only a member of the Brotherhood of Locomotive Engineers. Plaintiff Mitchell in his depositions has admitted that BLE has not violated any right he may have had or have had under the Merger Protection Agreement and the ICC order, and he further admitted that BLE did not breach its duty of fair representation as he stated that the BLE representatives in negotiating the agreements acted in the best interest of employees represented by BLE and, in fact, did the best they could under the circumstances of the negotiations.

Plaintiff Wash is a member of the Brotherhood of Maintenance of Way Employees. It is clear from the facts concerning Mr. Wash that he has no protection under that agreement and no standing to make claims concerning loss or diminution of that protection. He is not claiming in this lawsuit that he has rights under the 1972 Merger Protection Agreement, and he alleges no injury.

None of the named Plaintiffs is a member of the Brotherhood of Railway Carmen of United States and Canada.

Plaintiff Pace is a member of the Brotherhood of Railway Airline and Steamship Clerks Freight Handlers Express and Station Employees. He admitted that the claims against the BRAC are wholly without any basis whatsoever. He acknowledged during his deposition that he has no facts to support allegations in the amended complaint that his rights or the rights of any other member of BRAC have been violated as a result of the sale of the East Mississippi Lines. And, he also acknowledged that he has no facts to support the claim that BRAC breached its duty of fair representation.

Plaintiffs Fleenor, Jones and Pierce are members of United Transportation Union. These three individuals made like statements in their depositions and did not state in their depositions any facts upon which this Court could find that the union has breached its duty of fair representation.

The law in the area is clear. The duty of fair representation has been implied by the Supreme Court as arising from Section 1, Sixth; and Section 2, Second, Fourth Sixth, and Seventh of the Railway Labor Act, 45 U.S.C.. Section 151, subd. Six, Section 152, subd. Second, Fourth, Sixth and Seventh. *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). The duty emanates from the union status as exclusive representative of the employees within the bargaining unit which deprives the employees of their ability to deal directly with their employer. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 Footnote 14, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). This duty runs to the employees in the bargaining unit. *Bowen v. United States Postal Service*, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983), and it follows that the union owes no duty to persons who are not employees of the bargaining unit. A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. That's *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. at 916, 17 L.Ed. 2d 842 (1967). So pursuant to the standard established by *Celotex Corporation v. Catrett*, the Court finds that the Plaintiffs' claims as to Count I should be dismissed.

In the second cause of action, Plaintiffs charge the Defendant, ICG with having breached and repudiated the 1973 Labor Agreements in violation of the ICC orders. The Court holds that this is but a "minor" dispute and is to be arbitrated. This dispute concerns an established agreement and its terms. Hence, it is a minor dispute.

Consolidated Rail v. Railway Labor Executives' Association, U.S. 109 S.Ct. 2477, 105 L.Ed.2d 250 decided June 19, 1989. *Frandsen v. Brotherhood of Railway Airline & Steamship Clerks*, 782 F.2d 674 (7th Cir. 1986). The Court also notes that the Merger Agreements provide for arbitration here.

The Plaintiffs' third cause of action contend that G & M, with the assistance of ICG in its breach and repudiation of the 1973 Agreements, tortiously interfered with the contractual relationship existing between the ICG and its employees. Earlier this Court held that Plaintiffs' claim of unfair representation against the union should be dismissed. G & M was named as having colluded with the unions and with the ICG. The Court has found that Plaintiffs' evidence of unfair representation fails to meet the standards set out in *Celotex*. The Court further finds that, nevertheless, there was no evidence that G & M did anything other than to buy trackage from ICG. This not enough to subject it to liability regardless of the ruling concerning Plaintiffs' proof on the labor unions.

Furthermore, since there is no surviving federal claim against G & M, the Court declines to hear the Plaintiffs' pendent state claim alleging tortious interference with contractual rights. See: *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976).

There remains Plaintiffs' motion to amend the complaint or to certify a class. The Court denies that motion. The Court appreciates Rule 15 which liberally allows for the amendment of pleadings, and the Court is aware of Plaintiffs' argument that they have not sought to certify a class before now because one of the Defendants had not answered the lawsuit. The Court is also fully aware that Plaintiffs wish to amend to bring in some 182 or 184 new Plaintiffs. The Court is of the opinion that too much time

has lapsed from the filing of the complaint until the bringing of these motions. Moreover, the Court notes that a scheduling order setting out the time periods for filing motions expired before these motions were brought.

Finally, and most importantly, the Plaintiffs before the Court were advanced as representatives of a class of Plaintiffs who would have legally sufficient claims. The Court has reviewed the depositions of the six named Plaintiffs and has found them insufficient to pass muster under *Celotex*. The Court, thus, assumes that the selected Plaintiffs were indeed representative of any others who could be held into Court and thus sees no need to prolong further the life of the lawsuit.

Thus, this the opinion, this day in *Fleenor v. Brotherhood of Locomotives*, and the Defendants are to submit to the Court a judgment commensurate with the findings of fact and conclusions of law announced by the Court.

Any questions?

MR. MAXEY: Your Honor, it would be my understanding that a judgment would just make reference to the bench opinion and it would not necessitate any elaboration of the reasoning that the Court has announced today?

THE COURT: Since I have placed these matters on record, there is no need to do so.

MR. MAXEY: Thank you. So it can be sort of just the usual short form kind of judgment that makes the Court's ruling and incorporates the Court's reasoning?

THE COURT: That's correct.

MR. MAXEY: Thank you, Your Honor.

MR. IRBY: Excuse me. That would also apply for the Barlow matter also?

THE COURT: That's correct. Mr. Smith, any questions?

MR. SMITH: The Court's indulgence.

THE COURT: All right.

(Pause).

MR. SMITH: Your Honor, first of all, I'd like to introduce Mr. Harry Jordan, who is lead counsel, if you will on this particular matter. And as part of the particular ruling of the Court, so we can be clear as to relief, we'd like some direction as to what the Court is ordering in regard to arbitration as far as referring the matter to the ICC for arbitration.

THE COURT: The order is referred to the ICC for arbitration. Are you asking whether the Court is going to give some direction with regard to your contention that the Court should define some terms regarding decline in business?

MR. SMITH: No, sir, I don't believe we're requesting direction. We were just simply asking if that is the Court's order that this matter is being referred to the ICC for arbitration—to arbitration, excuse me.

THE COURT: To be referred to them for arbitration?

MR. SMITH: Or for arbitration.

THE COURT: All right. Let me hear from the other side on this matter. My ruling is that—well, let me hear from you first.

MR. MAXEY: Your Honor, as I would understand, the position of the Court would be that this matter would be subject to arbitration?

THE COURT: That is correct.

MR. MAXEY: As opposed to this Court' jurisdiction and would leave it at that, and then that would be a matter that would be taken up by the individuals under the rules that would apply to that arbitration procedure.

THE COURT: All right. Mr. Smith, I invited their comment because your term was referred and my ruling is merely that it's subject to arbitration. That this is a minor dispute and, therefore, subject to arbitration and does not possess subject matter jurisdiction before the Court.

One other matter. On the matter concerning the decline in business which at some point had been addressed by the parties whether this Court should give directions or should interpret certain terms with regard to that dispute the decline in business matter that has been submitted to arbitration. This Court holds that that matter if Plaintiffs are aggrieved over it should be submitted to the appropriate circuit court pursuant to 28 U.S.C. 2321, inasmuch as that section maintains that proceedings to enjoin or suspend an ICC ruling on an order should be brought in the Court of Appeals.

And finally in *Fleenor*, the Court also had before it the waiver issue whether those Plaintiffs who had signed waivers would be allowed to escape from the language contained within those waivers.

As in *Barlow*, the Court finds that sufficient evidence was not presented to the Court to show coercion or duress on the part of any of those who signed those waivers which would entitle tell them to now have those waivers declared invalid. Is there anything else?

MR. JORDAN: Your Honor, Harry Jordan. I just have one point of clarification. I'm a little confused on the arbitration aspect of it. As I understand your ruling, you have said that the controversy is subject to arbitration. Do I also understand that you are not ordering us to arbitration but just saying it is subject to arbitration?

THE COURT: Well, I'm ruling that this Court does not have subject matter jurisdiction since it's a minor dispute and that it's a minor dispute and should be arbitrated.

MR. JORDAN: Sir, if I understand, you're not affirmatively ordering us to arbitration which is, of course, what we would prefer.

THE COURT: You would prefer to be ordered to arbitrate?

MR. JORDAN: Yes, sir.

THE COURT: Let me hear from the other side why I should not order arbitration. You've ordered that this is a minor dispute which should be arbitrated.

MR. MAXEY: I think it's perhaps a semantical thing to some extent. As I understand the Court's ruling, the Court has said, as you just repeated, that a minor dispute is subject to arbitration rather than rising to the level of a court controversy, and therefore the Court is simply declining jurisdiction.

If the parties are able to assert an arbitral right under the applicable rules, then that would be something that would be done outside the ambit of this proceeding. And I fear that what the Plaintiffs are seeking is to be able to take this Court's order to the Board of Arbitration and say we have an order directing us to arbitrate this matter which would perhaps interfere with the normal arbitral processes.

THE COURT: Well, this Court has no intention of interfering with that process or any procedure that the arbitration panel might decide to take. The Court will simply determine, as it stated before, that this Court has no subject matter jurisdiction and this matter should be submitted for arbitration and that arbitration panel to handle the matter as its procedures dictate. Any additional questions?

MR. JORDAN: Yes, sir. The reason that we were seeking an affirmative order to go to arbitration I think was expressed by counsel primarily because we haven't had an adversary proceedings where the unions were on the other

side obviously. Their sympathy to our lawsuit does not encourage them to maybe be as cooperative as they would be as if we had an order. Not interfering with any judgment on the part of the arbitration board, but just an order from the Court saying that this should be sent to arbitration so that we don't end up down the road perhaps three or four years from now arguing over some procedural matter that in the meantime these people who are represented by the unions are getting in worse and worse shape and so we were trying to have something affirmative so that next week when we would try to take advantage of your decision and arbitration, we find out that we were blocked by procedural steps right and left when if it is a proper matter for arbitration then certainly we're happy to go and pursue that and to end it as quickly as we can.

THE COURT: What language would you like?

MR. JORDAN: Just an order to the affect that this proceedings is a matter that it is proper for arbitration and we order the parties to go to arbitration and pursue their other remedies.

THE COURT: All right, I don't see any problem with that, so long as it does not interfere with the internal procedures of the arbitration panel.

MR. JORDAN: Thank you, Your Honor.

THE COURT: All right then. Is there anything else? All right then. Gentlemen, thank you very much then and I'll expect the order within the time allowed uner the local rules.

(Recess).

* * * * * * * * * * * * *

CERTIFICATE

I, Colleen O'Connor White, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 17 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 23rd day of May, 1990.

/s/ Colleen O. White
Colleen O'Connor White

My Commission Expires:

April 3, 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J85-0613 (W)

JAMES DOYLE FLEENOR; WILLIAM R. PACE; JOHNNY E. JONES; WADELL WASH, EDWARD PIERCE, and THOMAS R. MITCHELL

Plaintiff

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF UNITED STATES AND CANADA; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; GULF AND MISSISSIPPI RAILROAD CORPORATION, ILLINOIS CENTRAL GULF RAILROAD, UNITED TRANSPORTATION UNION

Defendants

SOUTHERN DISTRICT OF MISSISSIPPI

FILED

SEP 24 1990

J. T. NOBLIN, CLERK

FINAL JUDGMENT

Pursuant to the Bench Opinion delivered in open court on May 22, 1990, the court hereby enters its final judgment as follows:

IT IS, THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

1. *First Cause of Action.* Based on the findings and legal conclusions delivered in the Court's Bench Opinion, the motions of all Defendants either to dismiss and/or for summary judgment are granted, and the claims of Plaintiffs James Doyle Fleenor, William R. Pace, Johnny E. Jones, Wadell Wash, Edward Pierce, and Thomas R. Mitchell set forth in the First Cause of Action of their Amended Complaint are hereby dismissed with prejudice.

2. *Second Cause of Action.* For the reasons set forth in its Bench Opinion, the court finds that it lacks jurisdiction over the subject matter of the claims of Plaintiffs James Doyle Fleenor, William R. Pace, Johnny E. Jones, Wadell Wash, Edward Pierce, and Thomas R. Mitchell in the Second Cause of Action of their Amended Complaint and therefore dismisses the Second Clause of Action.

3. *Third Cause of Action.* That a motion of the Defendant Gulf and Mississippi Railroad Corporation for summary judgment on all claims asserted against it by the Plaintiffs is granted, and final judgment is hereby entered in favor of the Defendant Gulf and Mississippi Railroad Corporation on all claims asserted against that Defendant in this action. The court declines to assert pendent jurisdiction over plaintiffs' state law claims.

IT IS FURTHER ORDERED AND ADJUDGED that each of the defendants are separately and severally discharged and dismissed from this action, and in accordance with Fed.R.Civ.P. 54(d), shall be allowed costs according to law as the prevailing parties.

SO ORDERED AND ADJUDGED, this the 21st day of September, 1990.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Civil Action No. J85-0613 (W)
Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J85-0613 (W)

JAMES DOYLE FLEENOR, ET AL.
Plaintiffs

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.
Defendants

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
SEP 27 199[illegible]
J. T. NOBLIN, CLERK

ORDER

Before the court is the motion of the plaintiffs, James Doyle Fleenor and others, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to amend the final judgment in this cause by ordering the parties to proceed to arbitration. The court inquired about the status of this case and was informed that the case was closed. Based upon this information the court assumed the matter to be fully and finally dismissed and was unaware of the plaintiff's Rule 59(e) motion until only recently. Having reviewed said motion and the defendants' responses thereto, the court hereby reiterates that it has no intention of interfering with any procedure that the arbitration panel might decide to take. The court simply determines, as it

stated before, that it has no subject matter jurisdiction over the dispute, that this matter should be submitted for arbitration, and that the arbitration panel shall handle the matter as its procedures dictate.

SO ORDERED this the 27th day of September, 1991.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Fleenor v. Brotherhood of Locomotive
Engineers J85-0613(W)
Order

APPENDIX D

SERVICE DATE
JAN. 10, 1975

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C. on the 27th day of December, 1974.

Finance Docket No. 25103

ILLINOIS CENTRAL GULF RAILROAD CO.—ACQUISITION—GULF, MOBILE AND OHIO RAILROAD CO., ILLINOIS CENTRAL RAILROAD CO., ET AL.

Upon consideration of the record in the above-entitled proceedings, including the (1) report and order of the Commission dated December 20, 1971, in this proceeding, 338 I.C.C. 805, granting the application; (2) petition of Illinois Central Gulf Railroad Co. (ICG) for approval of certain labor agreements filed October 2, 1972; (3) supplemental petition of ICG filed August 13, 1973, for approval of certain other labor agreements; (4) letter-petition of John E. Emrich for leave to intervene filed December 20, 1972; and the reply of ICG filed January 26, 1973; and

It appearing, That the Commission, in approving the acquisition by ICG of the Gulf, Mobile and Ohio Railroad Co. and the Illinois Central Railroad Co., prescribed the protective conditions set out in *New Orleans Union Passanger Terminal Case*, 282 I.C.C. 271, as modified at 338 I.C.C. 863-864, and required ICG to submit any further labor agreements modifying the said protective conditions to the Commission for approval;

It further appearing, That the petitions filed by ICG seek approval of agreements reached with the (1) Railway Labor Executives Association (representing various labor oragaizations), dated May 18, 1972; (2) Brotherhood of Railway, Airline & Steamship Clarks, Freight Handlers, Express and Station Employees, dated September 15, 1972; (3) Brotherhood of Maintenance of Way Employees, dated September 15, 1972; (4) United Transportation Union, dated May 9, 1973; and (5) Brotherhood of Locomotive Engineers, dated June 26, 1973;

It further appearing, That the interests of carrier employees covered thereby will be adequately and fairly protected by the terms of the agreements and that the agreements do not render the transaction inconsistent with the public interest; and that, accordingly the petitions should be approved but only on the condition that adversely affected unrepresented employees not covered by the labor agreements will continue to be protected by the heretofore imposed *New Orleans* conditions; and

It further appearing, That the petition of John E. Emrich for leave to intervene was not filed in accordance with the Rule 72 of the General Rules of Practice in that the petition was filed subsequent to the proceeding being called for hearing without good cause being shown for the late filing; that, in any count the matters complained of by the petitioner relate to actions which took place substantially prior to the transaction here; and that, good cause not having been shown, the petition should be denied;

It is ordered, That the above-described labor agreements, be, and they are hereby, approved, and that the above described labor agreements, be, and they are hereby, imposed as a condition to our approval of the entire transaction as required by *Norfolk & Western R. Co., v. Nemitz*, 404 U.S. 87 (1971); *provided, however*, that unrepresented employees not covered by the above-described labor agree-

ments, who are adversely affected by the transaction, will continue to be protected by the conditions set forth in the New *Orleans Union Passenger Terminal Case, supra*;

It is further ordered, That the petition of John E. Emrich for leave to intervene, be, and it is hereby, denied; and

It is further ordered, That except as modified herein, the report and order of the Commission, dated December 20, 1971, in this proceeding shall remain in full force and effect.

By the Commission.

/s/ Robert L. Oswald
ROBERT L. OSWALD,
Secretary,

(SEAL)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX E

AGREEMENT
FOR PROTECTION OF EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN CONNECTION WITH THE MERGER OF THE FORMER ILLINOIS CENTRAL AND GULF, MOBILE & OHIO RAILROADS

AGREEMENT
between
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
and
ILLINOIS CENTRAL GULF RAILROAD
FOR PROTECTION OF EMPLOYEES

WHEREAS, the former Illinois Central Railroad Company and the former Gulf, Mobile and Ohio Railroad Company (hereinafter sometimes referred to individually as Illinois Central and Gulf, Mobile and Ohio, or collectively as the Carriers) filed a joint application with the Interstate Commerce Commission (hereinafter called the Commission) for authority under Section 5(2) of the Interstate Commerce Act to merge the properties and franchises of the former Corporations for ownership, management, and operation of the properties separately owned and operated, and for certain other authority incidental thereto, as more fully described in Finance Dockets Nos. 25103, 25104, 25105 and 25106; received such authority, and merged on August 10, 1972;

AND WHEREAS, the New Company is chartered under the laws of the State of Delaware, and named ILLINOIS CENTRAL GULF RAILROAD COMPANY (hereinafter referred to as the New or Merged Company);

AND WHEREAS, approval and effectuation of the merger has had an adverse effect upon the employees represented by the labor organization party hereto;

AND WHEREAS, the labor organization signatory hereto is the authorized and recognized representative of certain

employees of former Illinois Central and former Gulf, Mobile and Ohio, and intervened in the above-described proceedings before the Commission on behalf of the said employees in opposition to the said application;

AND WHEREAS, Section 5(2) of the Interstate Commerce Act provides:

> As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order or approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

AND WHEREAS, pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act above quoted, the parties signatory hereto have

reached agreement respecting the protection to be afforded employees of the former Illinois Central and Gulf, Mobile and Ohio Railroads, and other carriers included in the merger;

Section 1—SCOPE AND PURPOSE

(a) The scope and purposes of this Agreement are:

i. To assure employment and/or earnings, as hereinafter prescribed, to defined employees of all the railroads involved in the Illinois Central and Gulf, Mobile Ohio merger,

ii. To expedite the changes in services, facilities and operations involved in the merger, and,

iii. To prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in service, facilities and operations involved in the merger.

(b) The New Company will take over and assume all contracts, schedules, agreements, and pending notices between the merging companies and the Brotherhood of Locomotive Engineers concerning rates of pay, rules, working conditions, and fringe benefits in effect on the date of the merger or inclusion therein and will be bound by the terms and provisions thereof in the same manner and to the same extent as if the New Company had been a party thereto, subject to changes made in accordance with the provisions of the Railway Labor Act, and subject to Section 7 of this Agreement.

(c) (1) The New Company will take into its employment all locomotive engineer employees (including all employees having seniority and equities as such) of the merging companies as of the effective date of this Agreement or subsequent thereto up to and including the date of merger, or inclusion, as is the case for the former Columbus and Greenville Railway. Protected employees of the said Car-

riers shall not be deprived of their employment relationship or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

(2) For the purpose of this Agreement the term "protected employee" means all engine service employees of the former Carriers having engineer's seniority, or being eligible for promotion to engineers and who rendered or had sufficient seniority to render compensated service between the effective date of this Agreement and the date of the merger, or inclusion therein, both dates inclusive.

(3) Employees who perform no service between the effective date of this Agreement (Section 14) and the date of consummation of the merger, or inclusion therein, account of illness, injury, dismissal, or other reasons, but resume service at any date subsequent to consummation of the merger, or inclusion therein, shall thereinafter be considered "protected employees" in the application of this sub-section (c), provided, if not so situated during the period above-mentioned their seniority would have permitted them to perform compensated service.

(d) The New Company shall also take over, assume and continue the employment relationship of all "protected" employees on furlough or leave of absence and preserve their rights and equities in accordance with schedules and agreements between the Carriers and the Brotherhood of Locomotive Engineers, subject to Section 7 of this Agreement.

(e) Within thirty days following the date of this Agreement, the carrier agrees to furnish Seniority District rosters (which shall be attached as Appendix "A" to this agreement) of all "protected" employees entitled to preservation of employment relationships, compensation, and fringe benefits, and also indicating all employees on furlough or leave of absence, each of which rosters shall also

set forth the former Carrier by which the employees were employed. The Carrier further agrees that the said rosters are subject to revision as necessary to include any em- * * * the provisions of this Agreement for that adjustment period.

* * *

(n) Any compensation whatsoever creditable to a given adjustment period (including vacation pay, arbitraries, pay for time lost, etc.) received from the New Company, but excluding payments made on account of personal injuries and penalty time claims when such payments are for reasons other than time lost, shall be used to reduce the amount of allowances due any employee in that adjustment period under this Section.

(o) The foregoing does not relieve employees of handling and processing claims on and in accordance with the form provided for that purpose; nor does it deprive the New Company of any defense against such claims which is available to it under Section 2 of this Agreement.

Section 3—OFFICIALS AND ORGANIZATION REPRESENTATIVES

If, subsequent to the date of the merger, officials, supervisory or fully excepted personnel and organization representatives exercise seniority rights in a craft or class of employees protected under said Agreement, then, during the period such seniority is exercised, such officials, supervisory or fully excepted personnel and organization representatives shall be entitled to the same protection afforded by the said Agreement to employees in the craft of class in which such seniority is exercised, and no protected employee subject to said Agreement shall be deprived of employment or adversely affected with respect to compensation and rules governing working conditions, fringe benefits, or rights and privileges pertaining thereto, by the return of the official, supervisory, or fully excepted employee to work under the schedule agreement.

Section 4—ADJUSTMENT DECLINE IN BUSINESS

(a) In the event of a decline in the New Company's business in excess of five per cent in the average percentage of both total railway operating revenues (Line 3, Indexed Page 300, ICC Report Form A) and total ton miles revenue-freight (Line 34, Indexed Page 508, ICC Report Form A) in any thirty-day period compared with the average of the same period for the years 1969 and 1970, a temporary reduction in the number of protected employees entitled to the monetary benefits of this Agreement may be made to the extent of one per cent for each one per cent that such decline exceeds five per cent. Such reduction will be confined to surplus protected employees, in reverse seniority order. The average per cent of decline shall be the total of the per cent of decline in total railway operating revenues and per cent of decline in total ton miles revenue-freight divided by two.

(b) The New Company may reduce the number of employees entitled to the monetary benefits of this Agreement in anticipation of a decrease in business, as defined in paragraph (a) above, but in the event it is later determined that part or all of said reduction was not warranted under this provision, the employees who were incorrectly deprived of benefits will have those benefits restored retroactively as promptly as possible.

(c) Notice of any such suspension of monetary benefits under paragraph (a) will be given to the General Chairman. The notice will contain the names, location, date of furlough and date protection was suspended, of all employees affected. Upon restoration of the New Company's business, employees whose benefits have been suspended will have them restored in accordance with the same formula, and the General Chairman will be notified.

(d) Railway operating revenues for the years 1969 and 1970 shall be increased initially and from time to time by the full percentage of interterritorial freight rate increases

authorized by the Interstate Commerce Commission, such adjustments to include increases during 1969, 1970, and subsequent thereto.

(e) Within sixty days after date of this Agreement, the New Company will furnish the General Chairman a statement showing actual base period ton miles-revenue freight and railway operating revenue and such revenue as increased by the percentage of freight rate increases referred to above. A similar statement in respect to freight rate increases occurring after the date of this Agreement will be furnished within sixty days of the increase.

(f) Notwithstanding other provisions of this Agreement the New Company shall have the right to make force reductions under emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike, provided that operations are suspended in whole or in part and provided further that because of such emergencies the work which would be performed by the employees whose positions are abolished is not performed. When forces have been so reduced and thereafter as operations are restored upon termination of the emergency, employees entitled to preservation of employment must be recalled. In the event the New Company makes force reductions because of the aforesaid emergency conditions, such reductions will count toward any reduction permitted by Section 4(a) of this Agreement.

Section 5—TRANSFER ALLOWANCE-MOVING EXPENSES

(a) When a "Protected Employee" is required, in order to preserve his guarantee, to transfer outside of the zone in which he last worked to a new * * * The allowance will be based upon the employee's guarantee.

(b) The acceptance of the allowance shall be at the option of the employee. Acceptance shall be in writing, shall be irrevocable and shall be received by the Supervisor

offering the allowance within fifteen (15) calendar days of receipt of such offer.

(c) An employee who elects to accept and is awarded such allowance thereupon terminates his employment relationship with the New Company, and the effective date of such termination shall be that date specified in the offer by the New Company. A minimum of fifteen (15) calendar days' advance notice of the date of termination of employment shall be given the employee accepting the allowance.

(d) The allowance herein provided will be in addition to any allowance to which such employee is entitled, but shall be in lieu of all other benefits and protections to which such employee may be entitled under this Agreement.

* * * * *

Section 10—DISPUTES PROCEDURE

For the purposes of the merger, Section 13 of the Washington Job Protection Agreement is inapplicable and the following provisions shall apply in lieu thereof:

In the event any dispute or controversy arises, except those arising out of Section 7 of this agreement, between the New Company and the representatives of Brotherhood of Locomotive Engineers with respect to the provisions of an implementing agreement upon which the parties have failed to reach agreement in accordance with Section 8 of this Agreement, the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 8(e) of this Agreement) or of any implementing agreement entered into between the New Company and the representatives of the Brotherhood of Locomotive Engineers pertaining to the said merger or related transaction, which cannot be settled by the New Company and the representatives of the Brotherhood of Locomotive Engineers within thirty days after the dispute arises, such dispute may be referred by either party to a Disputes Committee for con-

sideration and determination. Upon notice in writing served by one party on the other of intent by the party to refer the dispute or controversy to a Disputes Committee, each party shall, within ten (10) days, select a member of the Disputes Committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten (10) days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall be paid in accordance with existing law. If any party fails to select its member of the Disputes Committee within the prescribed time limit, such party's Chief Executive Officer or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The Committee shall meet within fifteen (15) days of the selection or appointment of the neutral member and shall render its decision within sixty (60) days thereafter. The decision of the majority of the Disputes Committee shall be final and binding.

Section 11—NATIONAL AGREEMENTS

This Agreement shall not be construed or used to prohibit or in any way limit the rights or obligations of the parties to modify or make changes in agreements affecting rates of pay, rules or working conditions to which the New Company is a party and which may be effectuated through concerted or national handling in the railroad industry.

Section 12—OTHER RAILROADS

The provisions of this Agreement shall be extended to the employees of all carriers included in the Illinois Central-Gulf, Mobile and Ohio merger who are represented by the Brotherhood of Locomotive Engineers.

Section 13—ELECTION OF MERGER PROTECTIVE AGREEMENTS

The New Company will notify all employees who qualify as a protected employee under terms of both this and any other merger protective agreement by U. S. Registered or Certified mail, giving such employees information for him to make a determination. The employee, within sixty (60) days after receipt of such notification, must advise the New Company whether he desires to be covered by this Agreement or the earlier merger protective agreement. Failing to make a selection, the employee will not be subject to the guarantee provisions and other protective benefits of this Agreement, but will instead retain the guarantee and other protective benefits of the earlier merger protective agreement, except to the extent that such earlier merger protective agreement might preclude making effective implementing agreements made pursuant to this Agreement.

Section 14—ARRANGEMENT PURSUANT TO 5(2)(f) OF INTERSTATE COMMERCE ACT

This Agreement which is effective November 3, 1971, two-hundred seventy-five (275) days prior to the consummation date of merger, is intended to provide a fair and equitable arrangement for the protection of the interests of the Carrier's employees represented by the Brotherhood of Locomotive Engineers as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended.

Signed this 30th day of May, 1973.

FOR THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS:	FOR THE ILLINOIS CENTRAL GULF RAILROAD COMPANY:
/s/ P. L. Piper General Chairman-former GM&O and	C. A. Burch Assistant Director of Labor Relations

C & G Railroad

/s/ J. W. Crawford
General Chairman-former
IC Railroad

/s/ John F. Roberts
Assistant Director of Labor
Relations

APPROVED:

/s/ L. S. Loomis
Vice President

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30439

GULF & MISSISSIPPI RAILROAD CORPORATION-PURCHASE (PORTION) - EXEMPTION-ILLINOIS CENTRAL GULF RAILROAD COMPANY

Decided: December 13, 1984

Background

Introduction. Gulf & Mississippi Railroad Corporation (G&M), currently a non-carrier,[1] seeks an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10901 regarding its acquisition and operation of approximately 713 miles of track known as the East Mississippi lines from the Illinois Central Gulf Railroad Company (ICG).[2]

The petition generated considerable interest from municipalities, shippers, and labor unions. The questions raised could not be resolved on the record evidence. Accordingly, by decision served June 26, 1984, interested parties were given an opportunity to file comments, pursuant to our notice and comment procedure. *See* Ex Parte No. 400,

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[1] G&M, a wholly-owned subsidiary of L.B. Foster Co. (Foster) was formed to purchase and operate certain lines of railroad. Prior to filing the petition, Foster controlled Greentree Transportation Co. (Greentree), a motor carrier subject to Commission jurisdiction. On March 7, 1984, Greentree's stock was placed in an independent voting trust, pursuant to 49 CFR 1013. Accordingly, Foster does not control and G&M is not affiliated with a regulated carrier at this time.

[2] The terms of the purchase are described in an agreement dated January 10, 1984. The consideration for the purchase is $22,000,000. Included in the transaction are certain ICG shops, rip track and rolling stock needed for operation of the lines.

Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505 (not printed), served December 29, 1980.

Numerous comments, as well as separate reply statements by ICG and G&M, were filed. Our review indicates that G&M's petition should be approved.

* * * * *

Comments In Opposition. The only non-labor opposition is from an individual, Mr. Norman Johnson, who contends that the sale would not be in the interest of Mississippi.[5]

Personnel Requirements and Labor Opposition. G&M's initial personnel requirements are: 70 maintenance of way and structures employees; 26 maintenance of equipment employees; 35 trainmen; 27 engineers; and 52 general administrative and other clerical employees for a total of 210 persons. Under the purchase agreement, G&M must select these employees from lists prepared by ICG covering its current roster of workers who will then negotiate separate agreements with G&M. Those employees not hired by G&M will continue to be employed by ICG.

The wage structure proposed by G&M will be a base pay at 85 percent of the employee's ICG base pay rate and an incentive bonus in the form of cash profit-sharing and/or stock. With that bonus, G&M contends that the total pay for employees, before overtime or fringe benefits, may be as much as 115 percent of their base rates as ICG employees.

ICG states that 261 employees are working and holding seniority in various job categories on the lines to be sold, and an additional 14 people in the maintenance of equipment category are furloughed. The weighted average wage and fringe benefit cost per year for the 261 employees is

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[5] Other opposition has been withdrawn.

$42,767.67 per employee. If employee protection were imposed on ICG, its expense would range from $13,086,702 to $66,953,122. Therefore, at the minimum figure, the cost of labor protection would constitute a substantial portion of the sales price, and at the maximum figure, the cost of labor protection would amount to approximately three times the sales price.

The Brotherhood of Railway Carmen of the United States and Canada (BRC), the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees' (BRAC), and the Railway Labor Executives' Association (RLEA) object to approval of the transaction without the imposition of labor protective conditions. BRC and BRAC object to the failure to consider seniority in the composition of the employee lists proffered by ICG, and they state that ICG cannot unilaterally make changes in any of the employees' collective bargaining rights. They object to the reduced wages being offered and to the uncertainties being created, both for employees to be hired and for those employees on the lists who are not hired.

RLEA adds that the new work rules have not been identified, and it seeks to determine (1) the type of work rules; (2) the kind of flexibility G&M seeks with regard to employees; (3) the number of employees to be relocated and (4) the nature of the profit-sharing incentives.

Additionally, RLEA filed a memorandum of law in support of its contention that labor protective conditions should be imposed. It recognizes that the Commission has a policy of declining to exercise its discretion in 49 U.S.C. 10901 proceedings to impose employee protective obligations on newly-formed acquiring carriers, such as G&M. However, it takes the position that this proposal is analytically similar to an abandonment by ICG, followed by G&M's purchase, and that 49 U.S.C. 10903 requires the imposition of employee protective conditions upon ICG, the

abandoning/vendor carrier. Accordingly, RLEA requests the imposition of the conditions in *Oregon Short Line R. Co.-Abandonment - Goshen*, 360 I.C.C. 91 (1979).

RLEA also argues that labor protective conditions should be imposed in order to carry out the rail transportation policy of 49 U.S.C. 10101a(12) to the encouragement of fair wages and safe and suitable working conditions in the railroad industry.

G&M and ICG replied to the labor comments. The employees to be hired by G&M are listed in order of seniority among those assigned to the lines involved in the transaction. The carriers note that no employees will be forced to accept employment with G&M. That decision will be voluntary on the part of the employees.

G&M also states that if labor protective conditions are imposed, the impact upon the economic feasibility of the proposed operation would be so severely adverse that G&M would be forced to withdraw from the transaction.

DISCUSSION AND CONCLUSIONS

Because G&M and its parent are non-carriers, G&M's acquisition of these lines from the ICG is subject to the requirements of 49 U.S.C. 10901. Moreover, Kyle's management agreement is not subject to the Commission's jurisdiction, because Kyle has been given only management functions, and has no control over or responsibility for G&M's properties.

Under 49 U.S.C. 10505(a), we must exempt a transaction from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction is not necessary to carry out the goals of the rail transportation

policy. G&M's planned track rehabilitation program will increase the safety and efficiency of rail operations. Granting the exemption will minimize the need for Federal regulatory control over the rail transportation system, will foster sound economic conditions in transportation, will reduce regulatory barriers to entry into the industry and will encourage efficient management. Regulation is also not necessary to protect shippers from the abuse of market power. The same lines of railroad will continue to operate, the only change being the transfer of title from ICG to G&M.

In fact, G&M's entry as a new common carrier providing improved service in place of ICG will increase transportation competition in Mississippi, Alabama, and Tennessee, by the introduction of a competitive alternative to other railroads as well as to motor and water carriers.

Neither G&M nor its parent control any rail line or any other mode of transportation operating in the area. Thus, there is no prospect of market power abuses from the new integrated operation. Finally, there is apparently no shipper discontent with the proposal as evidenced by the substantial shipper support for approval of the petition.

Given the absence of a potential for the abuse of market power, the Commission need not consider the scope of the transaction. Although the rail lines to be acquired are relatively lengthy, they have only a minimum potential as a bridge line for current or future traffic with connecting carriers. Therefore, most of the traffic routing will be controlled by local shippers, and the impact of this transaction will be essentially limited to the area served by the lines.

Labor. Under 49 U.S.C. 10505 (g)(2), we may not relieve a carrier of its obligations to protect the interests of employees. However, in transactions either under section 10901 or petitions seeking exemption from its requirements the imposition of labor protective conditions is dis-

cretionary. As we recently stated in Finance Docket No. 30505, *Alabama Southern Railroad Company, Inc. and the Alabama Great Southern Railroad Company-Acquisitions, Operations and Trackage Rights-Exemption,* ___ I.C.C. ___ (1984), the Commission has a long standing and judicially approved policy of *not imposing labor protective obligations upon newly formed acquiring carriers, since the burdens on new protection. See* e.g., *Matter of Chicago, M. St. P. & Pac. R. Co.* 658 F. 2d 1149,1171 (7th Cir. 1981); 363 I.C.C. 292,295 (1979). Here, since G&M is a newly formed company, and the imposition of burdensome labor protective conditions would clearly be inappropriate.

We do not accept RLEA's argument that transactions, such as the purchase here, encompass what amounts to an abandonment followed by an acquisition, with the result that we are required to impose the *Oregon Short Line* conditions with respect to the abandonment. In *Railway Labor Executives' Association* v. *United States* 697 F.2d 285, 286 (10th Cir. 1983) the Court affirmed the Commission's finding in Finance Docket No. 29389, *Railway Labor Executives' Association* v. *Durango and Silverton Narrow Gauge Railroad Company, and the Denver and Rio Grande Western Railroad Company,* (not printed), served March 12, 1981, that acquisitions of rail lines by non-carriers are governed solely by 49 U.S.C. 10901, and that the provisions of 49 U.S.C. 10903 do not apply. Therefore, the imposition of labor protective conditions is not required.

Moreover, although the labor representatives made certain general allegations of potential harm to affected employees, they did not attempt to quantify this harm. On the other hand, ICG furnished an adequate estimate of the burdensome effect upon it if labor conditions were imposed. ICG also submitted a comparison of labor protection costs measured against the purchase price of the lines it will sell. Clearly, the equities do not weigh in favor of imposing labor protective conditions as a discretionary

matter. Just as such conditions would be an undue burden on G&M, they would also impose a extremely heavy burden on ICG, since ICG has been unable to operate these lines profitably. (See G&M petition at page 3).

We also do not accept RLEA's argument that labor protective conditions should be imposed to carry out the policy of section 10101a(12) pertaining to the encouragement of fair wages and safe and suitable working conditions. RLEA has not demonstrated that the employees hired by G&M or retained by ICG would receive less than fair wages or be subjected to unsafe or unsuitable working conditions.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. Pursuant to 49 U.S.C. 10505, we exempt Gulf & Mississippi Railroad Corporation from the requirements of 49 U.S.C. 10901 for the acquisition and operation of the rail lines described above.

2. Notice will be published in the *Federal Register.*

3. This exemption is effective on February 4, 1985.

4. Petitions for reconsideration must be filed by January 23, 1985. Petitions for stay must be filed by January 14, 1985.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio. Commissioner Lamboley dissented with a separate expression.

/s/ James H. Bayne
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, dissenting:

I do not share the majority's evaluation of transactions here involved. In my view the record evidence amply demonstrates that the essence of this case is replacement of one rail carrier operation by another. ICG is discontinuing service in favor of service by Gulf & Mississippi (GM). GM's projections flow from an apparent estimate of traffic from which revenues should otherwise have accrued to ICG for service on the line. The interline arrangements with other carriers are substantial and material parts of the overall transaction. This should be construed as a § 11343 transaction.

APPENDIX G

ARBITRATION COMMITTEE

Pursuant to Section 8 of the May 18, 1972 Merger Protection Agreement

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ICC Finance Docket No. 25103

In the Matter of the Arbitration Between:
BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA,

Organization,

and

ILLINOIS CENTRAL GULF RAILROAD COMPANY,

Carrier.

Hearing Date: April 11, 1986
Hearing Location: Chicago,-Illinois
Date of Award: June 27, 1986

MEMBERS OF THE COMMITTEE

Employees'. Member: Thomas A. Woodley
Carrier Member: J. S. Gibbins
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIMS

1. That the Illinois Central Gulf Railroad Company has violated the eighteenth day of May, 1972 Merger Protection Agreement when on or about May 14, 1985, it furloughed carmen employees at Jackson, TN, thereby depriving these fully protected employees of their employment and placing them in worse position with respect to

compensation rules governing working conditions, fringe benefits and rights and privileges pertaining thereto.

2. That the Illinois Central Gulf Railroad Company has violated the eighteenth day of May, 1972 Merger Protection Agreement when over the last several years, it furloughed carmen employees at Mobile, AL, thereby depriving these fully protected employees of their employment and placing them in worse position with respect to compensation rules governing working conditions, fringe benefits and rights and privileges pertaining thereto.

3. That the Illinois Central Gulf Railroad Company has violated the eighteenth day of May, 1972 Merger Protection Agreement when on or about January 1, 1983, it furloughed carmen employees at Centralia, IL, thereby depriving these fully protected employees of their employment and placing them in worse position with respect to compensation rules governing working conditions, fringe benefits and rights and privileges pertaining thereto.

OPINION OF THE COMMITTEE

I. INTRODUCTION

In 1972, the Illinois Central Railroad (IC) and the Gulf, Mobile and Ohio Railroad Company (GM&O) merged to form the Illinois Central Gulf Railroad Company (Carrier). To compensate and protect employees adversely affected by the merger, the Interstate Commerce Commission (ICC) imposed the employee merger protection conditions set forth in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952) (New Orleans Conditions) as modified in 338 I.C.C. 863-864, on the Carrier pursuant to the applicable enabling statute. 49 U.S.C. § 5(2)(f).

In anticipation of the merger, the parties negotiated the May 18, 1972 Merger Protection Agreement which the ICC approved on or about January 10, 1975.

Immediately before the arbitration hearing, an attorney, Mr. Kauffold, representing some of the Claimants orally petitioned the Committee to personally appear before the Committee. After careful consideration, the Committee, by a two-to-one vote (with the Employees' Member dissenting), denied the counselor's request. The majority ruled that the Organization was the exclusive representative of all Claimants for purposes of adjudicating this case before this Committee. This Arbitration Committee derives its jurisdiction and authority from Section 8 of the May 18, 1972 Merger Protection Agreement. Section 8 expressly refers to disputes between the Carrier and ". . .any labor organization. . ." While the Merger Protection Agreement provides individual rights for employees, only a labor organization, which is the statutory representative of an aggrieved worker, or the Carrier may refer controversies regarding the interpretation of the Merger Agreement to an arbitration tribunal. Section 8 does not permit an individual's personal representative to prosecute a claim before this Committee especially when the Organization progressed the claim to arbitration. Thus, a private attorney representing some of the Claimants lacked standing to make a general appearance before this Committee.

At the Neutral Member's request, the parties waived the sixty-day time limitation for issuing this decision per Section 8 of the Merger Agreement.

II. PERTINENT CONTRACT PROVISIONS

This dispute centers on the application of Section 3(b) of the May 18, 1972 Merger Protection Agreement which provides:

> "In the event of a decline in the Merged Company's business in excess of five per cent in the average percentage of both total railway operating revenues (Line 3, Indexed Page 300, ICC Report Form A) and total ton miles revenue-freight (Line 34, Indexed Page 508, ICC Report

Form A) in any thirty day period compared with the average of the same period for the years 1969 and 1970, a reduction in force of protected employees represented by each organization signatory hereto may be made to the extent of one per cent for each one per cent that such decline exceeds five per cent. The average per cent of decline shall be the total of the per cent of decline in total railway operating revenues and per cent of decline in total ton miles revenue-freight divided by two.

"(1) The Merged Company may reduce the number of employees entitled to the benefits of this Agreement in anticipation of a decrease in business, but in the event it is later determined that part or all of said reduction was not warranted under this provision, the employees who were incorrectly deprived of benefits will have those benefits restored retroactively as promptly as possible.

"(2) Advance notice of any such force reduction will be given as required by schedule agreements. Upon restoration of the Merged Company's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within fifteen calendar days.

"(3) Railway operating revenues for the years 1969 and 1970 shall be increased initially and from time to time by the full percentage of interterritorial freight rate increases authorized by the Interstate Commerce Commission, such adjustments to include increases during 1969, 1970 and subsequent thereto.

"(4) Within sixty days after date of consummation of the merger, the New Company will

furnish each organization a statement showing actual base period ton miles-revenue freight and railway operating revenue and such revenue as increased by the percentage of freight rate increases referred to above. A similar statement will be furnished with respect to freight rate increases occurring after merger within sixty days of the increase."

III. BACKGROUND AND SUMMARY OF THE FACTS

The IC and GM&O were essentially parallel railroad lines. Both former railroads maintained main lines running from Chicago and St. Louis to New Orleans and Mobile. Upon consummation of the 1972 merger, the new enterprise operated approximately 9,650 miles of track.

After the merger, the Carrier abandoned or sold small, duplicative branch lines. Beginning in 1981, the number and magnitude of these divestitures increased. In addition, many of the sales involved main line trackage in geographic markets where the Carrier did not operate any parallel route. In 1985, the Carrier sold: (1) its East Mississippi Lines (737 miles to the Gulf and Mississippi Railroad Company); (2) its Shreveport, to Meridian, Mississippi line (418 miles to Mid South Rail Corporation); and (3) the Iowa lines (686 miles to the Chicago, Central and Pacific Railroad). All sales and abandonments were approved by the ICC. By the end of 1985, the Carrier operated 4,680 miles of track. According to the 1985 Annual Report of its parent corporation, the Carrier's objective was to further pare down trackage to attain a 3,000 mile core system. The substantial shrinkage in the size of the Carrier's system essentially triggered this controversy over the proper application of Section 3(b).

This case is the consolidation of claims emanating from Centralia, Illinois, Jackson, Tennessee and Mobile, Alabama. All Claimants were fully protected employees within the meaning of Section 1(b)(2) of the Merger Protection

Agreement. The first claim, filed on May 8, 1985, involves 117 Carmen who were laid off between January 1, 1983 and January 31, 1985 at Centralia, Illinois. The Organization alleged that but for the force reduction, Claimants would have earned $4,844,422.88. Second, on June 10, 1985, the Organization initiated a claim seeking protective benefits for 14 Carmen who were furloughed on May 15, 1985 at Jackson, Tennessee. According to the Carrier, one of these Claimants was away from work due to illness and three other Claimants did not suffer any loss of compensation. Third and also on June 10, 1985, the Organization claimed protective pay for seventeen Carmen and two Carmen Painters who were furloughed at Mobile, Alabama between January 9, 1982 and July 2, 1983. The Carrier replied that one of the named Claimants retired, another resigned and two others began working at Meridian, Mississippi effective October 1, 1984. However, in responding to each group of claims, the Carrier concurred (except as noted above) that each fully protected Claimant was placed on furlough status without protective benefits.

Section 3(b) contains a mathematical formula which is applied on a monthly basis to determine if the Carrier may suspend merger protective benefits for furloughed, fully protected Carmen. The formula incorporates two measurements of business activity: total railway operating revenues and total ton miles revenue-freight. The Carrier compares the current month's operating revenue and ton miles revenue-freight with the average level of each indicator for the identical months in 1969 and 1970. Periodically, the Carrier adjusts the monthly base figures to reflect the percentage increase in ICC approved interterritorial freight increases. If the comparisons disclose declines, the Carrier calculates the average percentage decrease of the two measurements. The Carrier may furlough, without compensation, an equivalent percentage of

fully protected Carmen for each whole integer the average percentage decline exceeds five percent.[1]

In recent months, the Carrier has registered business declines, as calculated according to the Section 3(b) formula, of twenty percent or greater. Like the hypothetical in Footnote 1, the most significant percentage decline has occurred in operating revenues. Thus, the Carrier furloughed many fully protected Carmen without paying them their merger guarantee.

The issue is whether or not the Carrier's loss of trackage, traceable to the sales and abandonments, should be taken into account when determining the Carrier's overall

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[1] Using hypothetical figures, the following example illustrates the series of calculations used to arrive at a single percentage decrease based on a combined comparison 'of present operating revenues and revenue ton-miles for a present month versus thc appropriate base.

	January Base	January 1986	Numerical Decline
Operating Revenue:	35,000,000	21,000,000	4,000,000
Freight Ton-Miles:	700,000,000	682,500,000	17,500,000

Percentage Decline

$\frac{14,000,000}{35,000,000} = 40\%$

$\frac{17,500,000}{700,000,000} = 2.5\%$

Average Decline

$\frac{40 + 2.5}{2}$ 21.25%

Percentage of Fully Protected Carmen Who Can Be Laid Off Without Protection

16.0%

decline in business under Section 3(b) of the May 18, 1972 Merger Protection Agreement. If the answer is affirmative, the second question becomes what is the proper remedy.

* * * * *

V. DISCUSSION

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B. Section 3(b) of the May 18, 1972 Merger Agreement

It is a fundamental rule of contract construction that the words in the Agreement are to be given their plain and usual meaning. Section 3(b) of the May 18, 1972 Merger Protection Agreement covers ". . .a decline in the Merged Company's business. . ." As the Organization avers, this general terminology is susceptible to several different interpretations. Ordinarily, a business decline refers to a loss of shippers or a reduced volume of freight precipitated by unfavorable economic fortunes over which the Carrier has little direct control. In exchange for valuable consideration, the Carrier sold a substantial portion of property. Without doubt, the Carrier lost business to the purchasers of the rail lines. Generally, a sale of assets causing a loss of revenue is not a genuine decline in business. However, the parties did not just broadly state the words "decline in business" in Section 3(b) but went on to specifically structure an exact mathematical formula for determining if a decrease in business occurred. The precision of the formula manifests the negotiators' sophistication. Put differently, the framers of Section 3(b) obviously realized what they were doing. The parties chose two variables for measuring the level of business activity. They were careful not to tie their definition of business declines exclusively to revenue generated from railroad operations. Total ton miles revenue-freight is often a more objective measurement of

the level of business activity. (The Committee notes that it is only the substantial reduction of operating revenues which has recently inflated the degree of business declines calculated under the formula.) The parties could have selected alternative or additional variables. Most importantly, the drafters of the Merger Agreement could have capped the formula. For example, they could have restricted any calculated decline to a monthly maximum of five percent of the fully protected carmen or they could have provided for an incremental increase in the five percent buffer for each month the business decline endured. The conspicuousomission of any cap on the average decline in business figure evinces the parties' intent that the formula would apply, not merely to temporary business downturns, but to prolonged and even permanent declines in business. The specific language of the formula defines and describes what the parties meant when they wrote the general term, "decline in business" in Section 3(b). Special Board of Adjustment No. 889, UTU v. NW, 10/20/78 (Bortz).

The basic dispute herein revolves around computation of the formula base. The Organization impliedly concedes that since 1972 the Carrier has properly calculated the base for each variable [and revised the 1969 and 1970 average operating revenue amounts pursuant to Section 3(b)(3)]. Instead, the Organization presents some persuasive equitable arguments for adjusting the base to reflect business eliminated or transferred as the result of track abandonments and sales. Although we agree with the Carrier that this Committee does not decide cases to effectuate equity, the Organization's contentions deserve some discussion.

The Organization attempts to draw a delicate distinction between interpreting the term "decline in business" in Section 3(b) and altering the negotiated formula. According to the Organization, adjusting the base to account for shrinkage of the Carrier's system is a simple remedy which properly applies Section 3(b) to only *bona fide* business

declines. For the reasons discussed below, sustaining the Organization's equitable arguments would compel us not only to fashion a novel remedy but to also substantively change the May 18, 1972 Merger Protection Agreement. Amending Section 3(b) is beyond our jurisdiction and authority. It is not our province to relieve a party from what may ultimately turn out to be a bad bargain. Special Board of Adjustment No. 806, Award No. 4 (Criswell).

Asserting that the negotiators of Section 3(b) could not possibly anticipate the sales of large segments of track, the Organization submits that the parties intended to restrict Section 3(b) to temporary business declines outside the Carrier's control. Perhaps, the negotiators could not foresee the magnitude of the subsequent sales and abandonments but they could predict that a merger of two parallel railroads would inevitably lead to the elimination of duplicative lines. In view of the contract language and the nature of the merger, the Organization's representations concerning the parties' intent (in 1972) is plausible but not necessarily correct.

The Organization's strongest argument is that, due to the recent sales, continued application of the decline in business formula without equitable adjustment to the base will vitiate the lifetime protection for all but a handful of fully protected workers. In essence, the sales and abandonments distort the average decline in business figure derived through the formula. Nonetheless, whether or not the May 18, 1972 Protection Agreement, in view of events occurring more than a decade after the merger, still satisfies the New Orleans Conditions is an issue which this Committee cannot decide. Section 8 restricts our function to ". . .the interpretation or application of any provision of this Agreement. . ." The Committee's consideration of this issue would infringe on the ICC's jurisdiction.

Even if we were persuaded by the Organization's equitable arguments, we could not provide it with a feasible

solution. The Organization has not proposed an accurate method of ascertaining the amount of business lost as a consequence of the sales. Its request that we simply reduce the base figures to correspond to the fraction of remaining railroad miles (as compared to 1972) is a speculative and unjustifiable remedy. The Organization has not come forward with any evidence that the sale of each rail line directly caused a proportionate loss of business. The Carrier may have abandoned and sold the lines producing the least amount of revenue. Also, the Organization's requested remedy disregards the increase in business on the Carrier's main arteries. Fashioning a speculative remedy foments more controversy than it settles.

In conclusion, this dispute can only be resolved by applying the specific language in Section 3(b). The formula therein is clear and unambiguous. Aside from Section 3(b)(3), there is no other provision for adjusting the formula's base. Section 1(b)(1) guarantees that all fully protected employees shall not be deprived of employment or placed in worse position with respect to their compensation at any time ". . .except as hereinafter expressly provided." While it may be operating inequitably, Section 3(b), as written, is an express exception to Section 1(b)(1). From whatever perspective we analyze this dispute, granting the Organization requested relief would improperly involve rewriting and substantively amending the Merger Protection Agreement. If we granted the Organization a contract provision which it was unable to obtain through negotiations, we would subvert and disrupt the preferred policy of collective bargaining.

Our decision is confined solely to interpreting and applying the May 18, 1972 Merger Protection Agreement. We have not addressed Claimants' entitlement, if any, to monetary benefits under any other protective arrangement. Similarly, nothing in our opinion speaks to the issues which might be within the exclusive jurisdiction of the ICC.

Finally, our Opinion does not foreclose the Organization from raising its allegations in another forum.

AWARD AND ORDER

The claims are denied.

Dated: June 27, 1986

/s/Thomas A. Woodley/I dissent
Thomas A. Woodley
Employees' Member

/s/ J.S. Gibbins
J. S. Gibbins
Carrier Member

/s/ John B. LaRocco
John B. LaRocco
Neutral Member

APPENDIX H

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 25103[1]

ILLINOIS CENTRAL GULF RAILROAD CO.—ACQUISITION—GULF, MOBILE & OHIO RAILROAD CO., ILLINOIS CENTRAL RAILROAD CO.

Decided: March 28, 1989

By petition filed June 24, 1988, The ICG Concerned Workers Association (Association) seeks imposition or modification of labor protection conditions in several proceedings involving the Illinois Central Gulf Railroad Co. (ICG). It also seeks an investigation to determine whether ICG purposefully reduced operations over certain lines prior to selling them, and a finding that a "decline in business" formula in 1972 labor protective agreements does not apply to line sales. The latter two requests are also tied to the ultimate remedy it seeks—greater labor protection than has been provided.

* * * * *

For the reasons stated below, we are denying: (1) the

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[1] Embraces Finance Docket No. 30439, Gulf & Mississippi Railroad Corporation—Purchase (Portion) Exemption—Illinois Central Gulf Railroad Company; Finance Docket No. 31063, MidSouth Corporation—Control Exemption—MidSouth Rail Corporation and MidLouisiana Rail Corporation; Finance Docket No. 30807, MidSouth Rail Corp.—Acquisition and Operation Exemption—Illinois Central Gulf Railroad Co. [See subsequent explanation for inclusion of this proceeding.]; Finance Docket No. 31186, MidSouth Corporation—Continuance in Control Exemption—SouthEastern Rail Corporation; Finance Docket No. 31187, SouthEastern Rail Corporation—Acquisition and Operation Exemption—Gulf & Mississippi Railroad Corporation; and Finance Docket No. 31231, IC Industries, Inc., Illinois Central Transportation Co., and Illinois Central Gulf Railroad Company.

petition for labor protection with respect to the merger and the GMRR and MidSouth Rail purpose transactions; (2) the request that we institute an investigation; and (3) the request for a finding that the "decline in business" formula does not apply to line sales.

* * * * *

DISCUSSION AND CONCLUSIONS

The Association notes that 49 U.S.C. 11351 authorizes the Commission to issue supplemental orders in section 11342-11345 and 11347 proceedings, when cause exists, and that section 10505 exemptions can be revoked. While not seeking to revoke the transactions themselves, the Association contends that cause exists for reopening the merger proceeding and the GMRR and MidSouth Rail exemption proceedings to grant the above-noted requests for relief.

In the merger proceeding, the unions argued that labor protection greater than the then-standard *New Orleans*[10] conditions should be imposed, but they provided inadequate evidence for the Commission to prescribe other conditions. In the circumstances, the Commission granted the application subject to the *New Orleans* conditions and the ability of the parties to negotiate different conditions and submit them for approval.

Five agreements reached between ICG and various labor organizations[11] were approved late in 1974 in a brief un-

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[10] *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as modified in *Southern Railway Co.–Control–Central of Georgia Ry. Co.*, 317 I.C.C. 557, 566 (1962) [and later modified in *St. Louis-Southwestern Ry.-Pur.-Alton and Southern R.*, 342 I.C.C. 495, 522 (1972)].

[11] The labor organizations were: (1) Railway Labor Executives' Association (RLEA), on behalf of Brotherhood of Railway Carmen of the United States and Canada (Carmen) and several other labor organi-

printed decision of the Commission.[12] The essential provisions of these agreements were the same in substance. Each contained provisions according protected employees "lifetime" job protection. However, this was subject to management's right to effect reductions in force if the average percentage of ICG's operating revenues and total revenue-freight ton-miles declined by more than 5 percent in any 30-day period compared to corresponding figures for the years 1969 and 1970. Here, the Association challenges the propriety of making reductions in force under color of the "decline in business" formula when ICG began to restructure its operations to a core trunk-line system by selling east-west branch lines to new operators such as GMRR.

The agreements containing the "decline in business" provision had been in effect for about 10 years when the GMRR sale took place. Labor opposed the Commission's exempting the GMRR and MidSouth Rail sales without imposition of labor protection conditions, but the Commission declined to impose such conditions. RLEA then sought judicial review. Before a decision was reached there, however, ICG and the labor organizations negotiated labor protection agreements regarding the GMRR sale. As part of those agreements, the labor organizations withdrew their opposition to the transaction.

At that point, certain dissatisfied employees formed the Association and tried to prosecute the petition for review in court. The court denied intervention, however, on the

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zations; (2) Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC); (3) Brotherhood of Maintenance of Way Employees (BMWE); (4) The Brotherhood of Locomotive Engieners (BLE); and (5) United Transportation Union (UTU).

[12] Finance Docket No. 25103, *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile and Ohio Railroad Co., Illinois Central Railroad Co., et al.*, (not printed), served January 10, 1975.

grounds that the Association lacked standing because its members were represented by their labor organizations. The Association then sued ICG, GMRR, and the labor organizations. It alleged that the defendants "breached or otherwise tortiously interfered with contract rights guaranteed to the Association's members under the 1972 merger protective agreement" and violated various provisions of the Railway Labor Act and the Interstate Commerce Act. That suit was still pending when the Association filed the petition in this proceeding.

* * * * *

We turn now to the Association's request that we issue a declaratory order interpreting the "decline in business" formula in the labor agreements between ICG and its employees' labor organizations. As noted, when business declines, the agreements authorize ICG to reduce its labor force by a percentage computed in relation to the extent of the decline. If the formula is triggered, ICG is relieved of its otherwise applicable obligations to protected employees. The Association asks us to find that the formula does not apply when the cause of the decline is a rail line sale.

This is part of its effort specifically to obtain: (1) retroactive imposition of the so-called *New York Dock*[15] labor protection benefits for "current and former ICG employees of GMRR and the MidSouth System," and (2) the payment of a $75,000 severance allowance to ICG employees who surrendered employment rights with ICG in connection with the GMRR and MidSouth Rail sales. In doing so, it is addressing the "exceptional circumstances" criteria,, described in Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of C&NW Transp. Co.—Petition for Clarification* (not

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[15] *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

printed), served January 29, 1988, at page 3, (*Fox River*), that would justify labor protection in noncarrier's acquisition cases. Specifically, it seeks to show that there are exceptional circumstances involving misuse of the Commission's rules or precedent regarding ICG's application of the "decline in business" formula.

The agreements adopting the formula specify arbitration as the exclusive method for resolving disputes with respect to the interpretation or application of any provisions of the agreements. Of the five labor organizations that signed those agreements, only the Carmen took the matter of the use of the formula in connection with line sales to GMRR and MidSouth Rail to arbitration. On June 27, 1986, the arbitration committee issued a decision finding that: the mathematical formula was clear and unambiguous; that, had a different result been intended, the parties could have selected alternative or additional variables or capped the formula; and that the equitable remedies proposed by labor were not feasible. It concluded that the "decline in business" formula did not exclude declines resulting from line sales. Here, the parties bargained for, and we approved, agreements specifying arbitration as the resolution mechanism, and we will not interfere with that scheme. Both the courts and this Commission have recognized the special role of labor arbitrators in resolving disputes. *See, e.g., United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960), and *Chicago & North Western Tptn. Co.—Abandonment*, 3 I.C.C.2d 729, 735 (1987), *aff'd sub nom. International Bhd. of Electrical Workers* v. *ICC*, ___ F.2d _ (Nov. 25, 1988). Accordingly, we will deny the Association's request for an interpretation of the formula. In sum, the Association is simply in the wrong forum. *See Brotherhood of Locomotive Engineers* v. *ICC*, 808 F.2d 1570, 1578 (D.C. Cir. 1987); and *Walsh* v. *ICC*, 723 F./2d 570, 574-75 (7th Cir. 1983). *See also Bell* v. *Western Maryland Railroad Company*, 366 I.C.C. 64, 68 (1982); and *Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977). As a result,

we cannot find that ICG's application of the decline in business formula was a misuse of the Commission's rules or precedent that would warrant imposition of labor protection on the sale to GMRR.

Another circumstance that the Commission will consider exceptional under *Fox River, supra,* arises when existing contracts specify that line sales are subject to procedural or substantive protection. The Association contends that ICG interfered with existing contracts between the ICG and the unions and with substantive protections granted to employees in connection with the merger. However, it does so only in connection with its "decline in business" argument in a summary paragraph. No facts, argument, or explanation is offered to substantiate its claim. Since the subsequent agreements between the ICG and the unions expressly preserve all existing contract rights, we conclude that this circumstance has not been proven.

The Association also contends that the third *Fox River* criterion is met here—that injury to labor as a result of the ICG sales was unique, disproportionate to the gains achieved for the local transport system, and can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales. *Fox River, supra,* at 3-4.

Many employee statements have been filed describing such things as reductions in income, changed working conditions, expense of relocating or traveling to more distant work stations, and the necessity of making elections about staying with ICG or working for GMRR or MidSouth Rail or about accepting alternative benefits. However, the Association does not prove that the injury is unique, and much of its argument about disproportionate injury is addressed to the more recent MidSouth Rail purchase of GMRR's lines, which, as noted; we will address in a separate decision in Finance Docket Nos. 31187 and 31186

that will consider evidence still being submitted by various parties.

We do not find that the injury to labor from the ICG sales to GMRR and MidSouth Rail is disproportionate to the public benefits derived from the sales. By selling the East Mississippi lines to GMRR rather than abandoning them, ICG more quickly avoided operating losses and offset some labor protection costs that would have occurred with abandonment or with the purchaser's employment of ICG personnel. Continuation of service and retention of employment opportunities are important public benefits to be weighed against harm to employees. Also, as we have frequently found, the burden on new operators of marginal lines is great enough without the additional cost of labor protection, and labor protection imposed on selling carriers in such transactions could indirectly burden the new operator.

Moreover, the employees here were not left wholly without labor protection. The labor organizations negotiated agreements in each proceeding providing substantial protections. Employees could elect these in lieu of the benefits under the merger agreements. Many employees chose to be covered by the new agreements. Of this group, a number accepted a $25,000 job separation allowance so that they could accept positions with the new owners. If things did not work out as expected, as seems to be the case for some employees, this was a risk they accepted and does not of itself show that employees bore a disproportionate burden.

We conclude the the Association has not established that the burden on labor is unique or disproportionate to the important public benefits of continued operation of the lines. We also conclude that imposing the requested additional protection at this very late date on these acquisition agreements, which would have been jeopardized by such conditions, would be manifestly disruptive and harm-

ful and substantially undo the prospective benefits of the Commission's policy for other communities and locales.

The Association also appears to be arguing that its members are entitled to labor protection because the line sale that resulted in the job losses fall within the contemplation of the transactions originally approved by us in Finance Docket No. 25103, and thus within the scope of the conditions then imposed. Successful assertion of this argument would require a determination that a causal connection exists between the originally approved transactions and the subsequent line sales. We have found that there must be a reasonably direct causal connection between a merger and the event that adversely affects employees for employees to be accorded benefits under the conditions we impose. *See* Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern, Inc.—Control and Merger—St. Louis—San Francisco Railway Company (Petition for Review of Arbitral Award)*, not printed, served June 23, 1988, slip op. at 7. The Association does not allege, nor does the record support, any finding that such direct causal connection exists here. Therefore, we need not further consider whether employees are protected by the conditions we imposed in the original transactions.

For the above reasons, Association's petition for an investigation, interpretation of the merger agreements' "declined in business" formula, and reopening the merger, ICG-GMRR and ICG-MidSouth Rail transactions for imposition of employee protective conditions must be denied. As noted, the IC Industries "spin-off" proceeding in Finance Docket No.31231 has already been separately decided, and no decision is being made here in Finance Docket Nos. 31186 and 31187, which are pending decision on a record that will also contain argument and evidence by other parties.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The ICG Concerned Workers Association is granted leave to intervene in Finance Docket Nos. 25103, 30807, and 30439.

2. The Association's request for a page limitation waiver is granted.

3. The Association's petition for reopening and imposition or modification of labor protective conditions in Finance Docket Nos. 25103, 30439, and 30807 is denied.

4. The Association's petition is dismissed to the extent it encompasses Finance Docket No. 31063.

5. The Association's petition in Finance Docket No. 31231 has already been separately decided and is thus moot.

6. No separate decision in Finance Docket Nos. 31186 and 31187 will be entered here for the reasons noted in this decision.

7. This decision is effective on the service date.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

/s/ Noreta R. McGee
Noreta R. McGee
Secretary

(SEAL)

APPENDIX I

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 25103[1]
ILLINOIS CENTRAL GULF RAILROAD CO.—ACQUISITION—GULF, MOBILE & OHIO RAILROAD CO., ILLINOIS CENTRAL RAILROAD CO.

Decided: September 11, 1989

By petition filed April 24, 1989, The ICG Concerned Workers Association (Association) seeks reopening and reconsideration of our decision served April 3, 1989. The Association alleges material factual errors, legal insufficiency, and general transportation importance. The Illinois Central Railroad Company (ICR) and Midsouth Corporation, MidSouth Rail Corporation, and Southrail Corporation (Midsouth) have replied.

The Association's requests are denied. It has failed to demonstrate material error, new evidence, or substantially changed circumstances, as provided in our regulations, 49 CFR 1115.4, and thus has not satisfied the criteria for reopening. The Association merely reiterates its original arguments and states, with no support, that the Commission's decision was inaccurate and wrong. Reiterating arguments fully considered and properly resolved in the prior decision does not justify reopening.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[1] Embraces Finance Docket No. 30439, Gulf & Mississippi Railroad Corporation—Purchase (Portion) Exemption—Illinois Central Gulf Railroad Company; Finance Docket No. 31063, MidSouth Corporation—Control Exemption—MidSouth Rail Corporation and MidLouisiana Rail Corporation; and Finance Docket No. 30807, MidSouth Rail Corp.—Acquisition and Operation Exemption-Illinois Central Gulf Railroad Co.

It is ordered:

1. The Association's petition to reopen and reconsider is denied.

2. This decision is effective on the service date.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

/s/ Noreta R. McGee
Noreta R. McGee
Secretary

(SEAL)

APPENDIX J

TEXT OF CITED STATUTES

28 U.S.C. §1254(1) Courts of appeals; certiorari; appeal; certified question

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expendition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held; *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

49 U.S.C. § 10505 Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

Federal Rules of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 23. Class Actions

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order

under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

S.D. Miss. Uniform Local Rules

These Local Rules shall be effective January 1, 1986, and as amended July 1, 1992; shall apply to pending cases except where injustice would result; and shall govern both civil proceedings and criminal cases, where applicable, in the United States District Courts within the State of Mississippi.

RULE 6. DISCOVERY

(d) Scheduling Order. Pursuant to Rule 16(b), FRCP, within thirty (30) days after issue is joined in a case, but no later than 120 days after the complaint is filed, counsel are required to present the Magistrate Judge a proposed order setting forth deadlines for the joining of other parties and amending the pleadings; service of motions; and the completion of discovery. If more than six months discovery time is requested, the proposed order should be accompanied by an explanation of the necessity for the protracted period. The proposed order shall provide that motions to add parties or amend the pleadings must be served within one-half of the time proposed for the completion of discovery. The proposed order shall also provide a deadline for the designation of experts in accordance with subparagraph (g) of the rule. The proposed order shall

further provide that all other motions, with the exception of evidentiary in limine motions, shall be served no more than thirty (30) days after the date scheduled for the completion of discovery.

RULE 8. MOTION PRACTICE

(f) Untimely Motions. Any motion served beyond the motion deadline imposed in the Scheduling Order entered pursuant to Rule 6(d) may be denied solely because the motion is served untimely. Parties are encouraged to file all non-dispositive motions prior to the discovery deadline.

RULE 13. CLASS ACTIONS

In all lawsuits filed as class actions, the class plaintiff must, not later than sixty (60) days after filing of answer, move for a Rule 23 class determination. The named plaintiff has the burden of establishing by way of pleadings and evidentiary materials that a class action is appropriate and of defining all relevant classes and subclasses.

Although the Court may deem it necessary to schedule an evidentiary hearing on the class aspects of any case, it is anticipated that in the usual situation pleadings, affidavits, other evidentiary materials, and legal memoranda submitted by both sides should be an adequate basis for the Court to make a class action determination. Interlocutory procedures, when appropriate, will be tailored to fit each case.

"OLD" RULE 18—CLASS ACTIONS

In all lawsuits filed as a class action, the named plaintiff must file and notice for hearing a Motion for Class Certification, pursuant to F.R.Civ.P. 23(c), within 45 days after the answer is filed. If there are multiple defendants in the case the Motion for Class Certification must be filed and notices for hearing within 45 days of the filing of the last answer.

Fifth Amendment, United States Constitution

No person shall be . . . deprived of . . . property, without due process of law. . . .

(2)

No. 92-554

FILED
OCT 29 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JAMES DOYLE FLEENOR, et al.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; AND UNITED TRANSPORTATION UNION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the grant of summary judgment entered by the district court when the petitioners opposed the motions upon the conclusory allegations of their complaint, had admitted on deposition that the respondent unions had not engaged in any unfair conduct directed to them and that the respondent rail carriers had fulfilled their legal and contractual obligations to them, and failed to produce concrete evidence that respondents unions had colluded with either or both railroad respondents or that respondent unions had engaged in bad faith or discriminatory conduct directed to any petitioner?

2. Whether the Court of Appeals correctly held that the district court did not abuse its discretion in denying petitioners' motions for class certification or for leave to add 184 new plaintiffs as untimely under the district court's agreed scheduling order and the local rules on the basis that the motions were filed over four years after the complaint and three years after completion of discovery and entry of the scheduling order?

3. Whether the Court of Appeals erred in affirming the dismissal of petitioners' claims against respondent Illinois Central Gulf Railroad for alleged violations of protections imposed by the Interstate Commerce Commission on the ground that petitioners had failed to exhaust their mandatory arbitral remedies provided by the Commission to resolve such disputes?

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STATEMENT

In the latter half of the 1970s, the Congress began the process of revitalizing and deregulation of the railroad industry. Congress first adopted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31. In 1978, it enacted the Revised Interstate Commerce Act. Pub. L. 95-473, 92 Stat. 1337. And on

October 14, 1980. Congress passed the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. These statutory changes significantly altered the administrative process before the Interstate Commerce Commission ("ICC") and the effects of approved and exempted railroad transactions upon employees.

Almost immediately following the statutory changes the ICC took the position that the imposition of employee protection was discretionary. *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 658 F.2d 1149, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Then the Commission adopted a policy of declining to exercise its discretion to impose employee protection in all acquisitions. *See, e.g., Knox & Kane R. Co. – Petition for Exemption*, 366 I.C.C. 439, 443-444 (1982). And shortly after the underlying acquisition involved in this case, the ICC issued a general rule that labor protection would not be imposed upon the seller or buyer of a rail line when the buyer is not an existing rail carrier. *See Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition of Rail Line Under 49 U.S.C. §10901*, 1 I.C.C. 2d 810 (1985). The various Federal Courts of Appeals agreed with the issuance of the class regulation and the Commission's refusal to impose employee protection upon the sale of marginal lines of railroad. *See, e.g., Simmons v. ICC*, 829 F.2d 150 (D.C. Cir. 1987); *Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987); and *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985).

In an attempt to stop these sales to noncarriers and to obtain the former levels of employee protection provided by 49 U.S.C. §11347, disgruntled employees have attempted to use the judicial process to do so by filing

various actions against the selling carrier, the acquiring noncarrier and their unions based upon alleged contractual breaches, misrepresentations and purported acts of unfair representation by the employee representatives. This is one of these cases.

This case begins on January 10, 1984, when respondent Illinois Central Gulf Railroad Company ("ICG") agreed to sell its East Mississippi Lines to the respondent Gulf & Mississippi Railroad Company ("G&M"). Among other things, the sales agreement required G&M to employ 210 ICG employees.

On March 16, 1984, G&M filed a petition with the ICC requesting exemption of the acquisition and operation of the East Mississippi Lines from the prior approval requirements of 49 U.S.C. §10901. The respondent unions, the Brotherhood of Locomotive Engineers ("BLE"), the Brotherhood of Maintenance of Way Employes ("BMWE"), the Brotherhood of Railway Carmen of the United States and Canada ("BRC"), the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC"), and United Transportation Union ("UTU"), entered a protest through an umbrella organization, the Railway Labor Executives' Association ("RLEA"), opposing the transaction and requesting, as a matter of law under the Revised Interstate Commerce Act, imposition of employee protective conditions.[1] At least three of the organizations, BLE,

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[1] Since the institution of this suit, ICG has become the Illinois Central Railroad Company, BRAC has been renamed the Transportation Communications International Union, and BRC has become a division of that union. Their former names are used throughout this brief.

BRAC and BRC, filed separate protests. On December 13, 1984, the Commission granted the petition for exemption, and adopted its "long standing and judicially approved policy of not imposing labor protective obligations upon newly formed acquiring carriers," such as G&M, "since the burdens on new operations are great enough without the additional costs of labor protection." *Gulf & Mississippi Railroad Corporation – Purchase Portion – Exemption – Illinois Central Gulf R.R. Co.*, Finance Docket No. 30439.

On January 14, 1985, RLEA filed a petition with the ICC on behalf of its constituent members, including the five union respondents, requesting a stay of its order pending review, and on January 25, 1985, filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. *Railway Labor Executives' Association v. Interstate Commerce Commission*, No. 85-1049 (D.C. Cir.). With the ICC failing to act upon its request for a stay, RLEA requested a stay of the Commission's order from the Court of Appeals on January 31, 1985, which was denied by the court on the following day.

Following the announcement of the sale in January 1984, respondent ICG and each of the unions had entered into negotiations relative to a protective agreement that would provide protection for ICG employees who might be adversely affected by the sale. (*See, e.g.*, R. 950 at ¶¶2, 3).[2] It was not until after the issuance of the Commission's order in December 1984, however, that ICG and the union respondents began to reach agreements known as

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[2] "R" refers to the page of the record as filed with the Court of Appeals.

"Transfer Agreements," Transfer Agreements were reached with BRAC on January 15, 1985; with BRC and UTU on January 16, 1985; with BMWE on January 23, 1985; and with BLE on March 28, 1985.

The agreements between the unions and ICG were essentially the same and provided the following benefits to its employees:

1. ICG promised to guarantee the income of employees as of the date of the sale, who subsequently were deprived of employment or placed in a lower paying job, for a six year period commencing with the date of dismissal or displacement.

2. Employees already covered by the Merger Protection Agreements arising out of the 1972 creation of ICG could choose to accept the Transfer Agreement benefits or the protections contained in the 1973 protective agreements. In addition, those employees taking the benefits under the Transfer Agreements could, at the end of the six-year period, revert to any protection they might have remaining under the Merger Protection Agreements.

3. Employees voluntarily resigning from ICG to accept employment with G&M would receive a severance allowance of $25,000.

The employees were kept advised of the negotiations, and in the case of BLE, for example, the Transfer Agreements were ratified. (R. 726, ¶¶17-19, Ex. S-U; R. 950).

Several months later, on June 12, 1985, the six petitioners, who are or were ICG employees, filed their action, and, on July 2, 1985, filed an amended complaint

purported to be a class action. BRC filed a motion for summary judgment because none of the petitioners was a member of BRC or the craft of railway carmen represented by it. The six remaining respondents filed answers. After completion of discovery, those six respondents also filed motions for summary judgment. (R. 395; R. 511; R. 705; R. 716; R. 886).

On July 21, 1989, more than two years after the filing of these motions, petitioners moved to have the case certified as a class action, notwithstanding the requirements of Fed. R. Civ. P. 23(c)(1), the local court rules, and an agreed upon scheduling order entered by the district court on October 15, 1986. (R. 387; R. 1013).

On May 22, 1990, the district court delivered a bench opinion granting summary judgment for each of the respondent unions on the ground that they had not unfairly represented petitioners. For example, the district court found that petitioner Mitchell, the only named plaintiff who was a member of BLE and a local union officer, admitted that "BLE has not violated any right he may have had or have had under the Merger Protection Agreement and the ICC order, and he further admitted that BLE did not breach its duty of fair representation as he stated that the BLE representatives in negotiating the agreements acted in the best interest of employees represented by BLE and, in fact, did the best they could under the circumstances of the negotiations." Based upon their testimony, similar findings were made with respect to the other petitioners and the unions to which they belonged. As to BRC, the trial court found no named plaintiff to be a member of that union and, therefore, no basis for any claim against it.

The second cause of action, which was against ICG and related to the interpretation, application and enforcement of the protections under the 1973 Merger Protection Agreement and the Transfer Agreements, was held to be a minor dispute, subject to arbitration under the resolution procedures of those agreements. As to the third cause of action, the trial court found that "there was no evidence that G&M did anything other than to buy trackage from ICG," and this was not evidence of its having colluded with the unions and ICG.

Finally, the district court found that the class certification motion did not lie, because "too much time has lapsed from the filing of the complaint until the bringing of these motions" and "the time periods for filing motions expired before these motions were brought." In addition, the court found that petitioners did not pass muster as class representatives, did not have sufficient claims themselves and were not representative of others in the purported class.

Final judgment was entered on September 24, 1990. (R. 1204). A motion to amend the judgment was denied on September 27, 1991. (R. 1254).

Oral argument on petitioners' appeal to the Court of appeals for the Fifth Circuit was held on June 30, 1992. On July 2, 1992, the appellate court entered a judgment and order affirming, *per curiam*, the decision of the district court.

REASONS FOR DENYING THE WRIT

This case involves no question of law that is novel, unique or requires review by this Court in the exercise of its power of supervision. As to the respondent unions, the case involves only the question of whether the Court of Appeals correctly canvassed the record in holding that the unions were properly granted summary judgment, which the district court found an appropriate vehicle for disposition of petitioners' claims because the unions established they had not acted hostilely or irrationally and had not engaged in the discriminatory or bad faith conduct required to establish a breach of the duty of fair representation.

This ruling is consistent with this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), and *Celotex v. Catreet*, 477 U.S. 317 (1986), in that the nonmovant petitioners relied on conclusory statements in their pleadings and affidavits, which were prepared after their depositions had been taken, and further failed to meet their burden to produce concrete evidence sufficient "from which a jury might return a verdict in [their] favor."

Moreover, the district court's finding that the unions' actions did not amount to unfair representation is in accord with the decision in *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. ___, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991), in which the Court held in the context of the negotiation of a collective bargaining agreement that the union does not engage in a breach of its fair representation duty unless

its behavior is "so far outside a 'wide range of reasonableness' . . . as to be wholly 'irrational' or 'arbitrary'." 111 S. Ct. 1127, at 1136, 113 L.Ed. 2d at 58. In the instant case, the Transfer Agreements were not a bad settlement to a difficult situation. Rather, the unions clearly acted on rational considerations, having been confronted with loss of jobs and evidence that the era of ICC imposed monetary protections was over. Hindsight establishes that the unions exercised their judgment in a manner by which they obtained jobs which otherwise would have been lost and obtained monetary protections for their members, including severance payments of $25,000 to ICG employees going to work for G&M, that the ICC would not have given. *Ibid.* In addition, the unions kept their members as well informed as possible, and each petitioner acknowledged that his union had not misrepresented or misstated the facts or acted to deceive them. *O'Neill v. Air Line Pilots Ass'n*, 939 F.2d 1199 (5th Cir. 1991) (on remand). In any event, summary judgment was properly granted each of the respondent unions, consistent with the rulings of this Court, because not one of the petitioners suffered any loss of rights under the agreements applicable to him and, therefore, none had a meritorious claim against the union to which they belonged. *Vaca v. Sipes*, 386 U.S. 177 at 187, 193 (1967).

Secondly, the Court of Appeals appropriately respected the district court's exercise of its broad discretion in refusing to permit the case to be maintained as a class action or to include a mass of hundreds of individually named plaintiffs. Petitioners failed to seek class certification "as soon as practicable after the commencement of the action," as required by Fed. R. Civ. P. 23(c)(1), or

within sixty days of the filing of answer as required by the rules of the district court. The need for discovery cannot be considered justification for the delay, since the motion to certify was filed more than four and one half years after commencement of the action and almost three years after discovery was closed in accordance with the scheduling order agreed to by petitioners. That one of the seven respondents, BRC, which did not have a member before the court, filed a motion for dismissal or alternatively for summary judgment, rather than an answer, also does not establish any abuse of discretion by the trial judge that would warrant reversal of the denial of the motion.

In addition, the refusal to certify the class was appropriate in that petitioners were not members of the class they purported to represent and accordingly lacked standing. *General Telephone Co. of the Southwestern v. Falcon,* 457 U.S. 147 (1982). Furthermore, none of the petitioners suffered any injury caused by the unions to which they belong and accordingly could not properly represent a class of persons purporting to have vaguely defined claims against those unions. *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403-404 (1977).

Finally, we note that contrary to petitioners' assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question concerning the major-minor dispute dichotomy under the Railway Labor Act which merits this Court's review. Petitioners' argument that the dispute between them and ICG is major is devoid of merit. The responsibility of the court below was merely to determine "whether a claim has been made that the terms of an

existing agreement either establish or refute the presence of a right to take the disputed action." *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989). Unless the railroad's "claims are frivolous or obviously insubstantial," the dispute is minor. *Id.*, 307. Once the employer meets the "relatively light burden" it bears, it "may make the change and the courts must defer to the arbitral jurisdiction of the Board." *Id.*, 307, 310.[3] Accordingly, the decision below is consistent with the holdings of this Court and its reading of the Railway Labor Act.

In sum, petitioners' claim is based upon an erroneous view of the Interstate Commerce and Railway Labor Acts and of the appropriate fields for collective bargaining and for arbitration. As a practical matter, the result that petitioners seek would stymie the efficiencies sought by the revised regulatory scheme and further transform the bargaining and negotiation process under the Railway Labor Act into a minefield of unstable labor relations. Moreover, petitioners' assertions do not accurately describe the holding below. That determination, whether or not correctly decided – and respondents believe it was – does not merit this court's attention.

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[3] It must also be pointed out that there is no merit to petitioners' contention that the Transfer Agreements altered or diminished their rights under the Merger Protective Agreements. In fact, the Transfer Agreements expressly recognized and preserved the employees' right to elect coverage under either agreement.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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No. 92-554

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES DOYLE FLEENOR, *et al.*,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY

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QUESTIONS PRESENTED

1. Did the court of appeals err in affirming the district court's determination that it lacked subject matter jurisdiction over Plaintiffs' claims that Illinois Central had erroneously interpreted certain of its collective bargaining agreements in view of the fact that such claims are subject to mandatory arbitration under the Railway Labor Act?

2. Was Illinois Central entitled to summary judgment in light of the district court's findings that each of the Plaintiffs had admitted that Illinois Central had not violated any of his rights under applicable collective bargaining agreements?

3. Did the court of appeals err in affirming the district court's denial of Plaintiffs' motion for class certification and Plaintiffs' alternate motion for leave to amend their complaint and add 184 additional plaintiffs nearly three years after the close of discovery, nearly three years after the date set for the filing of such motions in the court's Agreed Scheduling Order, and more than two years after Defendants had filed fully briefed dispositive motions?

LIST OF PARTIES

Petitioners have correctly identified all of the parties to the proceeding in the court below.

Respondent Illinois Central Railroad Company is a wholly owned subsidiary of Illinois Central Corporation.

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OCTOBER TERM, 1992

No. 92-554

JAMES DOYLE FLEENOR, *et al.*,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY

Respondent Illinois Central Railroad Company ("ICG")[1] hereby opposes the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case.

STATEMENT OF THE CASE

1. ICG engages in rail transportation operations along a generally north-south route between Chicago, Illinois, and various Gulf ports. ICG was formed as a result of a merger between the Illinois Central Railroad Co. ("IC") and the Gulf, Mobile and Ohio Railroad Co. ("GM&O")

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[1] At the time this litigation commenced, Respondent Illinois Central Railroad Company was known as Illinois Central Gulf Railroad Company. Accordingly, it will be referred to herein as "ICG".

approved by the ICC on December 20, 1971.[2] In its order granting the merger application, the ICC imposed its New Orleans Conditions for the protection of employees affected by the merger. 338 I.C.C. at 863-64. The Commission also imposed compulsory and binding arbitration on ICG, its unions, and its employees to resolve any disputes over an employee's labor protection rights or the proper interpretation of the conditions. Finally, the Commission ordered ICG to submit for ICC approval any future labor agreements modifying these protections. 338 I.C.C. at 864.

2. Following the approval of the IC-GM&O merger, ICG and its unions negotiated comprehensive collective bargaining agreements providing protections to persons employed on the date of the merger, August 10, 1972.[3] Each of these Merger Protection Agreements provides covered employees with a guaranteed income throughout their employment with ICG, not merely the five years of protection of the New Orleans Conditions. In exchange for this "lifetime" protection, however, the unions agreed to include "decline-in-business" formulae.[4] In addition, each agreement requires that all disputes over the meaning or interpretation of the agreement be resolved by final and binding arbitration. Pet. App. 31a-32a. ICG filed petitions with the ICC seeking approval of the Merger Protection Agreements, which the Commission granted on December 27, 1974. Pet. App. 21a-23a.

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[2] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R.*, 338 I.C.C. 805 (1971).

[3] Portions of the Merger Protection Agreement between ICG and the Brotherhood of Locomotive Engineers are set forth at Pet. App. 24a-34a. The agreements with the other unions are comparable.

[4] The decline-in-business formulae provide that, in the event ICG's operating revenues and total revenue-freight ton-miles decline in any 30-day period more than five percent below the averages for the years 1969 and 1970, ICG may make a corresponding reduction in the number of protected employees. Pet. App. 29a-30a.

3. In the late 1970's ICG management began reviewing the railroad's operations to determine whether there were lines that were unprofitable and that were not essential to the railroad's central mission as a north-south carrier. On January 10, 1984, ICG entered into a Purchase and Sale Agreement with GMO Acquisition Corp. (later renamed Gulf & Mississippi Railroad Corporation ("G&M")) that provided for the sale to G&M of ICG's East Mississippi Lines. R. 416. The agreement required G&M to employ 210 of the ICG employees who were working on the lines. G&M filed a petition with the ICC seeking an exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 10901 for its acquisition of the East Mississippi Lines. G&M asked the Commission not to impose labor protection conditions on the transaction. ICG's unions objected.[5] On December 13, 1984, the ICC granted G&M's petition and, in keeping with its "long standing and judicially approved policy . . . not [to] impos[e] labor protective obligations upon newly formed acquiring carriers" such as G&M, declined to impose any labor protection obligations on either G&M or ICG. *Gulf & Mississippi R.R.—Purchase (Portion)—Exemption—Illinois Cent. R.R.*, 1984 ICC LEXIS 61, *13 (1984); Pet. App. 40a.

4. While G&M's ICC petition was pending, ICG's labor unions asked ICG to enter into collective bargaining agreements providing labor protection for ICG employees affected by the sale. The so-called "Transfer Agreements" were signed in early 1985, shortly after the Commission's decision denying all labor protection had been issued. ICG agreed to protect the income of employees who might subsequently be deprived of employment or placed in a lower paying job because of the sale for a period of up to six

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[5] Objections were filed by the Brotherhood of Railroad Carmen, the Brotherhood of Railway, Airline, and Steamship Clerks, and the Railway Labor Executives' Association ("RLEA"), representing the chief executive officers of all railway labor unions.

years. Each agreement provided for binding arbitration to resolve all disputes. Each Transfer Agreement acknowledged that some ICG employees were already entitled to labor protection from some other source, such as the Merger Protection Agreements. The Transfer Agreements did not supersede or nullify the Merger Protection Agreements: each provided that an affected employee could elect which agreement's protections would apply. Employees who voluntarily agreed to resign from ICG to work for G&M were paid a severance allowance of $25,000 by ICG as a result of the Transfer Agreements.[6]

5. Prior to the closing of the sale G&M contacted ICG employees who were working on the East Mississippi Lines and offered them positions on the new railroad. Those who voluntarily chose to join G&M received $25,000 in severance pay from ICG. Those who declined remained with ICG and received the income protections provided in the Transfer Agreements or, if otherwise eligible and the employee so chose, the income protections of a Merger Protection Agreement. Approximately 207 employees joined G&M and resigned from ICG, effective July 8, 1985, the date of the sale. R. 40.

6. On June 12, 1985, Plaintiffs Fleenor, Pace, Jones, Wash, Pierce, and Mitchell filed this lawsuit against ICG, the unions representing its employees, and G&M.[7] Plaintiffs asserted in their Amended Complaint that their claims arose under Subchapter I of the Railway Labor

[6] In exchange, the unions, through RLEA, agreed to withdraw the petition that had been filed in the D.C. Circuit to review the ICC order approving the sale. The so-called ICG Concerned Workers Association, to which all of the Plaintiffs herein belonged, sought leave to intervene in the court of appeals in order to prosecute the appeal. On July 1, 1985, the D.C. Circuit dismissed the attempted intervention because the ICG Concerned Workers Association had not been a party before the ICC and, therefore, lacked standing to seek review of the Commission's order. R. 404.

[7] None of the Plaintiffs had chosen to join G&M. Thus, following the sale of the East Mississippi Lines, all remained ICG employees.

Act ("RLA"), 45 U.S.C. §§ 151-163, and certain provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343, 11345, 11347, and 11705. R. 30.

7. Plaintiffs alleged in their Second Cause of Action, directed at ICG, that ICG had "breached and repudiated" the Merger Protection Agreements by "entering into and carrying out the Purchase and Sale Agreement with G&M" and by "taking actions with the purpose and effect of reducing the value of the East Mississippi lines in order to facilitate its sale to G&M." R. 52. Plaintiffs further alleged that ICG, together with G&M and the unions, had "combined and conspired . . . to undermine and destroy the contractual rights of ICG employees pursuant to the [Merger Protection] Agreement." R. 51.[8]

8. Both railroads and all but one of the unions filed Answers to the Amended Complaint in late summer 1985, denying these claims and asserting various defenses. R. 78, 221, 248, 256, 277, 292. One union filed a motion to dismiss or, in the alternative, for summary judgment. R. 303.

9. During discovery, each Plaintiff testified that his claims against ICG arose from a dispute with ICG over the interpretation and application of the decline-in-business provisions in the Merger Protection Agreements: namely, whether ICG could use the decline-in-business formulae to reduce the number of employees entitled to benefits under the Merger Protection Agreements as a result of a loss of business flowing from a voluntary line sale.[9] Two of the Plaintiffs—Wash and Jones—admitted

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[8] In their First Cause of Action, Plaintiffs alleged that the unions had breached their duty of fairly representing them in connection with the East Mississippi Lines sale. R. 48. In their Third Cause of Action, Plaintiffs alleged that G&M had tortiously interfered with the rights of ICG's employees under the Merger Protection Agreements. R. 53.

[9] ICG's application of the decline-in-business formulae to business losses flowing from voluntary line sales and abandonments has been

that they were not covered by the Merger Protection Agreements since they had been hired by ICG after the IC-GM&O merger. Each of the remaining Plaintiffs admitted that he had not been adversely affected by ICG's interpretation of the decline-in-business formulae and that none of his rights under the Merger Protection Agreements had been infringed by the railroad.

10. On October 15, 1986, the district court entered an Agreed Scheduling Order, which provided that all discovery was to be completed on or before October 31, 1986; that motions for joinder of parties or amendments to the pleadings were to be served on or before October 23, 1986; and that all other motions, with the exception of evidentiary *in limine* motions, were to be served on or before November 28, 1986. R. 387.

11. All Defendants filed dispositive motions to dismiss or for summary judgment with respect to the personal claims of the six Plaintiffs by the November 28, 1986, date set in the Agreed Scheduling Order or within brief extension periods granted by the district court. R. 395, 515, 705, 716, 886, 946. Plaintiffs filed no motions seeking to join any other party or to amend their pleadings by the October 23, 1986, date set in the Agreed Scheduling Order. Although the case had been styled in Plaintiffs' Amended Complaint as a class action, Plaintiffs did not file a motion seeking class certification by the November 28, 1986, date set for the filing of all other motions.

12. After Plaintiffs had received Defendants' motions to dismiss, they filed a Motion for Stay of Proceedings and Referral to Interstate Commerce Commission. R. 538. Although Plaintiffs had themselves invoked the jurisdiction of the district court to resolve their dispute with ICG, they asserted in their motion that, because their claims that ICG had "breached and repudiated" the

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upheld in arbitration under the ICG-Brotherhood Railway Carmen Merger Protection Agreement. Pet. App. 43a-54a.

Merger Protection Agreements depended on an interpretation of the decline-in-business provisions in those agreements, the Commission, not the court, was the appropriate body to interpret them.[10]

13. Eighteen months passed, and Plaintiffs filed nothing with the ICC. Finally, on June 24, 1988, Plaintiffs, through the ICG Concerned Workers Association, filed a petition with the ICC asking the Commission to rule that ICG had violated the decline-in-business formula in the Merger Protection Agreements.[11] On March 28, 1989, the ICC denied the petition, ruling that any dispute over the proper interpretation of the decline-in-business formula was subject to mandatory arbitration under the Merger Protection Agreements.[12] The Commission subsequently denied two requests to reconsider its ruling.[13]

14. On July 21, 1989, while Defendants' dispositive motions were pending, Plaintiffs filed two additional motions with the district court: one seeking certification of the case as a class action and one seeking leave to amend their complaint to add one hundred eighty-four (184) additional plaintiffs. R. 1013, 1068.

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[10] Memorandum of Points and Authorities in Support of Reply to Railroad Defendants' Motions to Dismiss, or Alternatively for Summary Judgment, and in Support of Plaintiffs' Motion for a Stay at 11-12, filed on or about December 30, 1986.

[11] The "Petition of the ICG Concerned Workers Association, Pursuant to 49 U.S.C. § 10505(d) and 49 C.F.R. §§ 1115.4, 1115.5 and 1117.1, to Reopen These Proceedings and for the Imposition of Labor Protective Conditions and Other Relief" was filed in six separate ICC proceedings, including Finance Docket No. 25103, *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, the 1972 IC-GM&O merger case.

[12] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1989 ICC LEXIS 81 (1989); Pet. App. 55a-63a.

[13] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1989 ICC LEXIS 250 (1989) (Pet. App. 64a-65a); *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1990 ICC LEXIS 227 (1990).

15. The district court issued its bench opinion on all the pending motions on May 22, 1990. Pet. App. 2a-15a. After summarizing the facts surrounding the East Mississippi Lines transaction, the court found: (a) that Plaintiff Mitchell had admitted that his rights under the applicable Merger Protection Agreement and the ICC order approving it had not been violated; (b) that Plaintiff Wash was even not covered by a Merger Protection Agreement and, accordingly, had no standing to make claims concerning alleged violations of that agreement; (c) that Plaintiff Pace had no facts to support his claim that any of his rights under the applicable Merger Protection Agreement had been violated; and (d) that Plaintiffs Fleenor, Jones, and Pierce made "like statements in their depositions." Pet. App. 7a-8a. Based on these findings, the Court granted the unions' motions for summary judgment as to each Plaintiff. Pet. App. 8a.

16. The court found as a matter of law that it lacked subject matter jurisdiction over Plaintiffs' claims that ICG had "breached and repudiated" the Merger Protection Agreements because the dispute was a "minor" dispute subject to mandatory arbitration under the RLA. Pet. App. 9a.

17. The court also dismissed Plaintiffs' claims against G&M, finding that Plaintiffs had presented no evidence that G&M had "colluded" with the Unions. Moreover, it ruled that, in the absence of a surviving federal claim against G&M, it would not consider any surviving state law claims against G&M under the doctrine of pendent jurisdiction. Pet. App. 9a.

18. Having dismissed the claims of the six Plaintiffs against each of the Defendants, the court denied Plaintiffs' motions to certify the case as a class action or to amend the complaint to add 184 new plaintiffs, ruling that "too much time has lapsed from the filing of the complaint until the bringing of these motions." In particular, the court noted Plaintiffs' failure to comply with

the Agreed Scheduling Order. Pet. App. 9a-10a. The court further determined that certification of the case as a class action would be inappropriate in view of the fact that none of the six Plaintiffs had a personally viable claim. Pet. App. 10a.

19. On appeal, the Fifth Circuit affirmed the district court's judgment on the basis of its rulings, without issuing an opinion. Pet. App. 1a.

ARGUMENT

The court of appeals disposed of this case under its Local Rule 47.5, which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pet. App. 1a. This case is no more worthy of this Court's attention than it was worthy of a published opinion below.

1. The district court properly applied the standards enunciated by this Court in *Celotex Corp* v. *Catrett*, 477 U.S. 317 (1986), to the facts established during discovery in granting the union defendants' motions for summary judgment. The gravamen of Plaintiffs' claims against the unions, insofar as ICG is concerned, was that the unions had breached their statutory duty to represent Plaintiffs fairly by conspiring with ICG and G&M to deprive Plaintiffs of their rights under the Merger Protection Agreements.[14] However, as the district court found, each Plaintiff had admitted in his deposition either that he was not covered by a Merger Protection Agreement or that none of his rights under such agreement had ever been violated by ICG. Pet. App. 7a-8a. Evidence that Plaintiffs claim to have found after those depositions concerning

[14] Plaintiffs also claimed that the unions had failed to represent them adequately before the ICC in connection with G&M's application to purchase the East Mississippi Lines. Such claims did not implicate ICG.

ICG's alleged motivation in selling the East Mississippi Lines or concerning the "impact" of the sale on other ICG employees (Pet. 15-16) simply did not create a genuine issue of material fact with respect to the merits of the named Plaintiffs' claims.

2. Having properly dismissed the breach-of-duty claims against the unions relating to the alleged deprivation of Plaintiffs' rights under the Merger Protection Agreements, the district court correctly determined that any dispute that remained with ICG over the proper interpretation and application of the decline-in-business formulae contained in those agreements was a "minor dispute" subject to compulsory arbitration under Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i). This was a garden-variety application of the well-settled distinction between "major" and "minor" RLA disputes articulated in this Court's decisions in *Consolidated Rail Corp.* v. *Railway Labor Exec's' Ass'n*, 491 U.S. 299 (1989); *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978), and *Locomotive Eng'rs* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963). Plaintiffs' assertion that "ICG . . . substantively modified the [Merger Protection] Agreements to permit ICG to reduce its labor force and to avoid paying just compensation to discarded and displaced employees," and, hence, that this dispute is "major," is simply a disingenuous mischaracterization, as the courts below plainly recognized.

Nor is there merit to Plaintiffs' claims that the district court should have retained jurisdiction over this contract interpretation dispute because arbitration would have been futile or because ICG had "repudiated" arbitration. Pet. 24. Plaintiffs never filed or attempted to file a claim or grievance under the dispute resolution procedures in the Merger Protection Agreements, hardly surprising in view of their admissions that they either were not entitled to benefits under those agreements or had suffered no loss of benefits to which they were en-

titled thereunder. Finally, their assertion that ICG refused to institute arbitration proceedings when requested following the entry of judgment by the district court (Pet. 12 & n.6) is false. ICG simply would not agree to Plaintiffs' unilateral demand for "expedited arbitration" (a procedure not provided for in either the Merger Protection Agreements or the Transfer Agreements) and would not agree to proceed with the claims asserted until proper preliminary procedures had been followed under those agreements.[15] The district court quite properly determined that it lacked subject matter jurisdiction with respect to Plaintiffs' claims against ICG and that it would not interfere with the arbitration process as Plaintiffs sought. Pet. App. 13a, 17a, 19a-20a.

3. The district court acted well within its discretion in denying Plaintiffs' eleventh-hour motions to certify this case as a class action or to add nearly two hundred new plaintiffs. The motions were filed in flat violation of the court's scheduling order, long after the close of discovery, and in a transparent effort to moot the court's consideration of long-pending dispositive motions. Nothing Plaintiffs have said on this score in their Petition warrants review under the standards of S. Ct. Rule 10.1.

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[15] In particular, ICG requested information concerning "the dates employees were supposedly affected" and the "provision of any agreement that was violated." This was necessary to enable ICG to evaluate the merits of the claims, particularly because, as ICG explained, more than 60 of the employees on whose behalf Plaintiffs' counsel purported to assert claims had been hired only *after* the East Mississippi Lines sale and could not have been affected by that transaction. Moreover, ICG could not determine from the sketchy information that Plaintiffs' counsel provided whether another sizeable group had ever been employed by the carrier.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 30, 1992